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No.

In The

Supreme Court of the United States

October Term, 1991

GALAXY COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Federal Communications Commission's policy of awarding substantial preferences in comparative licensing proceedings to minority applicants, when an applicant's minority status is the only comparative factor in its favor and the second-ranked applicant equals or surpasses the minority entity on all other comparative considerations, violates the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Whether the lower court erred in refusing to consider an applicant's constitutional challenge to the FCC's minority preference policy because the issue was not first raised directly before the agency, where to do so would have been utterly futile because Congress had specifically directed the FCC not even to consider altering its minority preference policy.

Whether the Administrative Procedure Act's requirement that agency action be supported by "reliable, probative and substantial evidence" is satisfied where an applicant for a radio license, invoking the Fifth Amendment, refuses to provide critical testimony relating to its licensing proposal.

LIST OF PARTIES

The parties in *Susan M. Bechtel v. Federal Communications Commission*, 957 F.2d 873 (D.C. Cir. 1992) (consolidated case nos. 91-1112 and 91-1116) were appellants Galaxy Communications, Inc. (Galaxy) and Susan M. Bechtel (Bechtel), appellee Federal Communications Commission, and intervenor Anchor Broadcasting Limited Partnership (Anchor).

PARTIES' STRUCTURES

Galaxy is a privately held corporation whose sole shareholder is Alexander Soroka. Galaxy has no parent, subsidiary or affiliated corporations. Bechtel is an individual. Anchor is a limited partnership whose sole general partner is Herman F. Stamps and whose limited partners are R. Kenneth Mundy, Ridgley C. Bennett and Francis L. Smith.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Galaxy Communications, Inc. petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in *Susan M. Bechtel v. Federal Communications Commission*, 957 F.2d 873 (D.C. Cir. 1992) denying review in part of an FCC order awarding a construction permit for a new FM radio station to a competing applicant.

OPINIONS BELOW

The *Opinion* of the Court of Appeals is reported at 957 F.2d 873 (D.C. Cir. 1992) and is reproduced in Appendix (App.) A at 1a. The *Decision* of the Review Board granting Galaxy's application is published at 5 FCC Rcd 2432 (Rev. Bd.

1990) and is reproduced in Appendix B at 29a. The Commission's *Memorandum Opinion and Order* granting review of the Review Board's *Decision* is published at 6 FCC Rcd 721 (1991), reproduced in Appendix B at 16a. The Administrative Law Judge's *Initial Decision* is published at 4 FCC Rcd 5687 (1989), reproduced in Appendix B at 72a.

JURISDICTION

The *Opinion* (App. A at 1a) and *Judgment* (App. A at 1a) of the Court of Appeals were entered on January 31, 1992, as was an order withholding issuance of the mandate pending any timely petition for rehearing and/or suggestion for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution of the United States of America are the Fifth Amendment and Sections 1 and 5 of the Fourteenth Amendment, the texts of which are set forth in Appendix C at 91a. Relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987) are reproduced in Appendix C at 92a. Applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-459, 102 Stat. 2216-17 (1988) are set forth in Appendix C at 93a.

STATEMENT OF THE CASE

A. Introduction

On September 18, 1986, Petitioner Galaxy filed an application for a construction permit for a new FM radio station on Channel 250A at Selbyville, Delaware. Pursuant to Section 309(e) of the Communications Act of 1934, as amended, Galaxy's application was considered by an admini-

strative law judge in a comparative hearing along with the applications of several other entities, including Anchor.

Hearing sessions were held and the record was closed in May, 1988. *Initial Decision* (App. B at 73a). The Administrative Law Judge was released July 24, 1989, granting Anchor's application and denying the applications of Galaxy and the other parties. *Id.* (App. B at 89a). Galaxy and other applicants filed exceptions to the *Initial Decision* with the FCC's Review Board in September, 1988. The Board overturned the *Initial Decision* and granted Galaxy's application on April 10, 1990. *Decision* (App. B at 29a). The parties then filed Applications for Review of the Review Board's *Decision*. The Commission reversed the Board and reinstated the original grant of Anchor's application in a *Memorandum Opinion and Order* released February 8, 1991. (App. B at 16a.) Galaxy's appeal was denied by the Court of Appeals.[1]

Anchor is a limited partnership comprised of one general and three limited partners, all of whom are African-American. Galaxy's sole shareholder is white. In all other criteria by which the FCC evaluates the comparative strengths of its applicants, Galaxy, compared to Anchor, received equal or superior credit. Solely by virtue of Anchor's minority composition, however, it was awarded the construction permit for the Selbyville station. But for the preference bestowed upon Anchor on the basis of its principals' minority status, Galaxy would have prevailed. Anchor's four principals are successful

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[1] In the Court of Appeals, competing applicant Bechtel had challenged the procedural validity of the FCC's comparative licensing scheme. The court remanded Bechtel's case to the FCC on that score. *See Susan M. Bechtel*, *supra*. The FCC, in response to the remand, has initiated a proceeding to re-examine its comparative evaluation procedures. *See Notice of Proposed Rule-making*, FCC 92-98, released April 10, 1992. However, the Commission has announced its intention to apply any changes to its policies on a prospective basis only, and any changes would thus not apply to Galaxy's appeal. *Id.* at ¶ 41. Moreover, the outcome of that proceeding is not germane to Galaxy's petition to this Court, because Congress has forbidden the FCC to expend any resources toward any effort to rescind the minority preference policy.

business and professional men. The general partner is a retired dentist. Two limited partners are practicing physicians and one is a practicing attorney. *Initial Decision* (App. B at 74a).

B. The Framework Governing Comparative Evaluation of Applicants

The criteria applied to choose among competing applicants were codified by the FCC in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (the *1965 Policy Statement*). *See West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). That standard is driven by two goals: To achieve the best practicable service to the public and to effect the maximum diffusion of control of the media of mass communications. *Id.* at 394.

The extent to which these goals are satisfied by any given applicant is measured by various factors. Under diversification of the control of mass media, the FCC weighs the media holdings of other applicants, assigning the greatest credit to an applicant with no other media interests. *Id.* at 393-94. An applicant having no attributable mass media interests ordinarily prevails over one with such holdings. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 781 (1978) (quoting from *1965 Policy Statement*, *supra*). In practice, applicants with media holdings typically pledge to divest them if they are awarded the construction permit, a tack which puts them on a par with other applicants in the comparative analysis. For this reason, the outcome of comparative licensing proceedings seldom turns on the diversification criterion. None of the applicants for the Selbyville station had any media interests.

The best practicable service criterion has two principal parts. Under the first of these, the FCC allows an applicant to earn an advantage for a superior signal coverage proposal. *West Michigan*, *supra*, n.1. Under the second factor, the Com-

mission evaluates applicants on the basis of their respective "quantitative integration" proposals, *i.e.*, the extent to which the owners of the applicant will be involved in the management of the new station. If, as typically happens, the quantitative integration analysis yields a tie, other considerations -- "qualitative" or "enhancement" factors -- become the crucial determinants of the outcome. These enhancement factors are: Whether the applicants principals (1) are members of a minority group; (2) are residents of the service area or propose local residence; (3) are involved in civic affairs in the service area; and (4) have broadcast experience.

The two most important factors, of equal weight in the comparative balance, are minority status and local residence. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-46 (1985). Civic involvement is also a factor of considerable importance, although of lesser value than minority status or local residence. Broadcast experience is the qualitative attribute afforded the least weight. *1965 Policy Statement*, 1 FCC 2d at 396.

In the comparative evaluation here, both Galaxy and Anchor were awarded 100 percent quantitative integration credit by the ALJ. The case thus turned wholly upon qualitative enhancement factors. In the *Initial Decision*, released July 24, 1989, Anchor received enhancement credit for its minority composition and nominal credit for its general partner's pledge to move to the community of license. Galaxy accrued credit for local residence in the service area, civic activity, and superior signal coverage. *Initial Decision* (App. B at 89a).

The Review Board overturned the award of full integration credit to Anchor, finding that its limited partnership was a sham. This finding was subsequently reversed by the full Commission on review of the Board's decision. *Order* (App. B at 16a).

C. History of the FCC's Minority Preference Policy

The FCC's comparative selection criteria as set forth in the *1965 Policy Statement* were race-neutral. *Chapman Radio and Television Co.*, 19 FCC 2d 157, 183 (1969), *recon. denied*, 20 FCC 2d 624 (Rev. Bd. 1969); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd. 1972), *review denied*, 37 FCC 2d 559 (1972), *rev'd., TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) (*TV 9*). An applicant's "experience, background, and knowledge of the community" were considered the only appropriate qualitative factors under the "best practical service" criterion. 495 F.2d at 936.[2] In *TV 9*, however, the District of Columbia Circuit rejected the Commission's argument that "the 'Communications Act, like the Constitution, is color blind,'" and established that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" in the comparison. *Id.* at 938. Subsequently, in *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975), the court refused to accept the Commission's view that a racial preference should be awarded only when an applicant demonstrates a nexus between race and increased program diversity, on the supposition that race presumptively would promote such diversity when minority owners are integrated into the management of the proposed station.[3]

Following these holdings, the Commission concluded that minority ownership and participation warranted credit in the comparative process and decided that a preference would be awarded to minority applicants under the "best practicable service" criterion in Commission hearings. *WPIX, Inc.*, 68 FCC 2d 381 (1978).

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[2] In the *TV 9* proceeding the Review Board had held, and the Commission affirmed, that "[b]lack ownership cannot and should not be an independent comparative factor ...; rather, such ownership must be shown on the record to result in some public interest benefit." 33 FCC 2d at 18.

[3] *Id.* at 1063.

Three months after Galaxy filed its application, the Commission initiated a rulemaking proceeding to explore the agency's constitutional and statutory authority to award comparative preferences based on race or sex. *Reexamination of Racial, Gender or Ethnic Classifications*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484).

This inquiry was abruptly halted, however, by enactment of the *Continuing Appropriations Act for Fiscal Year 1988*, Pub. L. No. 100-202, 101 Stat. 1329 (1987) (App. C at 92a), which prohibited further consideration of "policies of the Federal Communications Commission with respect to comparative licensing . . . to expand minority and women ownership of broadcasting licenses, ..." The Commission was directed "to close MM Docket No. 86-484 with a reinstatement of prior policy . . . ."[4]

This congressional directive became effective December 27, 1987, some four months prior to commencement of the Selbyville comparative hearing before the ALJ. "In compliance with this law," the Commission terminated the *Inquiry* without making any findings or conclusions and ordered reinstatement of its comparative licensing policies regarding race, ethnicity and gender preferences as they had existed prior to September 12, 1986. *Reexamination of Racial, Ethnic or Gender Classifications*, 3 FCC Rcd 766 (1988).

The issue of the FCC's minority preference scheme was revisited when this Court agreed to review the policy in *Metro*

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[4] Essentially identical provisions have been enacted by the Congress and signed by the President for all subsequent fiscal years. *See Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (App. C at 93a); *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Pub. L. No. 101-162, 103 Stat. 988, 1020 (1989); *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1991*, Public Law 101-515, 104 Stat. 2101, 2136 (1990); *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1992*, Public Law 102-140, 105 Stat. 782, 797 (1991).

Broadcasting, Inc. v FCC, 110 S.Ct. 2997, decided June 27, 1990. Galaxy filed a brief *amicus curiae* in that case, supporting the position of the appellant. In *Metro Broadcasting*, a slim majority of this Court, over the dissent of four Justices, upheld the policy and affirmed the grant of Rainbow Broadcasting Company's application for authority to construct a new television station.

REASONS FOR GRANTING THE WRIT

A. This Case Presents a Fact Pattern Distinguishable From That Which Formed The Predicate For The *Metro Broadcasting* Decision, Creating an Unresolved Constitutional Issue Which This Court Should Address

1. Controlling Facts and Rationale of *Metro Broadcasting*

In *Metro Broadcasting*, the applicant by that name challenged the FCC's grant of the application of Rainbow Broadcasting Company. As summarized by the Review Board's decision in that case, a comparison of the quantitative integration proposals of the applicants gave the advantage to Rainbow, a consideration the Board deemed "probably a 'clear' enough difference to be decisional." *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 703 (Rev. Bd. 1984). While the resolution of the comparative merits of the applicants could have ended there, the Board also found Rainbow the preferred applicant on "qualitative" grounds. This analysis involved a balancing of several factors. Rainbow was awarded a "substantial" preference for minority participation bolstered by "a solid broadcast experience preference" because of the significant past broadcast experience of its 85 percent principal. *Id.* at 700. Metro, on the other hand, received a "moderate" preference for superior local residence and civic participation. *Id.* at 704. In the comparison of proposed signal coverage, the Board viewed Rainbow and Metro as tied. *Id.* at 699.

Metro Broadcasting thus presented the Court with a fact pattern involving an amalgam of considerations, of which Rainbow's minority composition was one. It could fairly be said in that case, as the *Metro Broadcasting* majority opined, that the minority preference was but one "plus" in the mix of factors which determined the outcome. Indeed, notably, the FCC's Review Board deemed Rainbow the ostensible winner on quantitative grounds alone, before even reaching the qualitative analysis.

Not surprisingly, therefore, the *Metro Broadcasting* majority emphasized that "the FCC has compared minority preferences to local residence and other integration credits" and the Court took pains to discredit Metro's assertion that "the minority enhancement credit is not part of a multifactor comparison of applicants but rather amounts to a *per se* preference for a minority applicant in a comparative licensing proceeding." *Id.* at 3012, 3026 n.50.

Predicated upon this factual background, the *Metro Broadcasting* majority proceeded to reason that the FCC's "interest in enhancing broadcast diversity is, . . . an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies." *Id.* at 3010. Analogizing to Justice Powell's reasoning in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), which grounded a race-conscious university admissions program on the desirability of a "diverse student body," *id.* at 311-313, the *Metro Broadcasting* majority found that "the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 310. The majority concluded that "benign race-conscious measures mandated by Congress -- even if those measures are not 'remedial,' . . . are constitutionally permissible to the extent that they serve important governmental objectives . . . ." *Id.* at 3008-3009.

In *Metro Broadcasting*, Rainbow's superior ranking was plainly the result of a dynamic interplay of factors, with credit accruing on either side of a balance which ultimately tipped in

Rainbow's favor. Indeed, the FCC's Review Board found that Rainbow's quantitative integration proposal alone was probably dispositive. In other words, the minority preference was merely one among a mix of variables at play in the outcome.

2. Operative Facts In This Case

The facts of the instant case, however, are wholly distinguishable and thus will not sustain the rationale of the *Metro Broadcasting* majority. Here, Anchor's superior ranking patently constituted a *per se* preference. Galaxy surpassed or equalled Anchor on every comparative criterion. Anchor could not have prevailed but for the racial composition of its principals. Race was not one of several factors, but the sole factor, which determined the outcome of this case.

Hence, any logic the *Metro Broadcasting* majority's rationale may have in a case where minority status truly functions as one of a variety of factors is simply inapplicable here. To see this clearly, the rationale of *Bakke* must be considered.

3. The "Diversity" Rationale In *Bakke* Does Not Resolve The Issues In This Case

In *Bakke*, Justice Powell approved of an educational institution's use of race as one factor among many to attain the laudable goal of a diverse student body. In this way, students would be exposed to the "atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- [that] is widely believed to be promised by a diverse student body." *Id.* at 312. Race was found to be acceptable for consideration by admissions officers in universities, but only as *one* element for consideration in that process. *Id.* at 314.

Justice Powell flatly and forcefully rejected the use of race for the purposes of achieving proportionality. *Id.* at 304. A *per se* preference mechanism was unquestionably impermissible. "Preferring members of any one group for no other rea-

son than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 309. Because just such a *per se* preference dictated Anchor's victory in the instant case, the *Bakke* analogy fails under these facts.

The arbitrariness and, indeed, incoherence, of the minority preference as applied in this case is accentuated when a further point is considered. As explained at page 5, *supra*, the FCC recognizes an additional comparative factor, not tied to management participation. Under the "comparative coverage" criterion, an applicant whose technical proposal will cover greater area and population than competing applicants is entitled to a preference for that greater coverage.

In this case, Galaxy will provide coverage to 25 percent more area and 19 percent more people than Anchor. *Initial Decision* (App. B at 74a). Thousands of people live in the part of Galaxy's proposed coverage area which will not receive even a minimal signal from Anchor. How can it be said that they will benefit from the diversity assumed to flow from Anchor's programming? The logical implication of the Commission's comparative analysis in this case is the preposterous conclusion that the public is better off deprived of any service at all rather than be subjected to the racially less "diverse" sounds which the Commission presumes will be broadcast by Galaxy.

The interface of the comparative coverage preference and the minority preference was not explored in *Metro Broadcasting*, as the preferred applicant in *Metro Broadcasting* did not have an inferior technical proposal. Thus, the *Metro Broadcasting* Court did not sanction the result that has been produced by the strange alchemy at work here. Accordingly, the twisted outcome of this case does not pass constitutional muster, even assuming the soundness of the *Metro Broadcasting* majority's rationale as applied to the facts of that case.

4. An *A Priori* Defect In The "Diversity" Analogy Suggests A Fundamental Error In The *Metro Broadcasting* Holding Which Is Not Fact-Specific

At a more basic level, however, the *Metro Broadcasting* majority's line of reasoning fails because there are fundamental differences between the academic and broadcast settings. First, under Justice Powell's rationale in *Bakke*, it is not diversity in itself that justifies the use of race in giving a preference; it is diversity in the discussion of ideas in the context of a university education. Further, diversity is significant only when, absent a minority preference, there would not be a sufficient number of minorities present to bring to their classmates the variety of points of view that their education requires. *Bakke*, 438 U.S. at 312.

The crucial fact in the academic diversity rationale is that non-minority students, interacting and freely exchanging ideas with minority students, will associate diverse opinions with their advocates -- the minority speakers. In this way, racial stereotypes are broken down. Thus, the racial or ethnic diversity of those present has, in some contexts, a teaching function.

Diversity in broadcast ownership is wholly distinguishable. A radio station audience cannot "see," as the students can, the proponents of the ideas which the station disseminates. Diverse views expressed in editorials and in the presentation of news rarely reflect the race or ethnicity of the licensee. A minority-owned station will not necessarily have news, editorials and public affairs programming tailored to a minority viewpoint. Rather, all broadcasters, minorities as well as non-minorities, must respond to the demands of the marketplace. Thus, minority-owned stations often broadcast programming related to needs of the general audience, and many stations owned by non-minorities have provided exemplary service to minority communities for many years. Accordingly, minority ownership cannot be said to break down racial pre-

judices in the sense envisaged by Justice Powell in *Bakke*. Nor can there be a credible argument that, absent the minority preference, the public will be done a constitutional injury under the First Amendment.

If Justice Powell's rationale in *Bakke* is to be transferred to the broadcast setting, it will be necessary to reconsider what he meant when he said that minority status (to be appropriately considered) would have to be one of a number of factors weighed. *Bakke*, 438 U.S. at 314. His point was that the university's goal must honestly be that of achieving diversity of opinion and ideas and not that of merely increasing the number of minorities. *Id.* at 314. Justice Powell reasoned that good faith in pursuing this objective would be found only if the university also sought persons of different economic status, different geographical backgrounds, different ages, etc. *Id.* at 315. These additional factors go to the question of diversity.

The FCC's minority preference policy, however, does not operate this way. The only factors considered in determining an applicant's diversity are race or ethnicity. The other factors for which qualitative enhancements are given -- local residence, civic involvement, past broadcast experience -- go not to the applicant's diversity but to his or her ability to operate a broadcast facility in the public interest. *See 1965 Policy Statement*, 1 FCC 2d at 393.

Indeed, the FCC's attention to these other enhancement factors strongly suggests that, except for minority status or ethnicity, no other "diversity" factors are weighed, and even non-diversity factors are weighed positively in the comparative balance. This is starkly different from the university context. If, in the university, admissions officers considered only performance, character, exam results -- *and race* -- race would plainly not be one among a variety of "diversity" factors. Yet, that is precisely the structure of the FCC's minority preference policy. Because various enhancement factors are used in the comparative contest, they are erringly perceived as different

diversity factors. In short, the word "diversity" is unwittingly used duplicitously in the two contexts.

Not surprisingly, a vigorous dissent to the *Metro Broadcasting* majority's rationale was voiced by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Justice Kennedy, joined by Justice Scalia, also filed a separate dissenting opinion. *Id.* at 3028, 3044.

Justice O'Connor invoked the fundamental propositions that "the Government must treat citizens as "individuals" rather than "components of a racial . . . class," and that "the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they think or act." *Metro Broadcasting* at 3028-29. The departure from these principles marked "a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citizens." *Id.*

Justice O'Connor's concern over the majority's adoption of a group-rights perspective, oblivious to the equities of specific cases, is particularly apt here. Anchor's four black principals are accomplished professionals -- a dentist, two physicians and an attorney. Hence, application of the majority's rationale without regard to its implications in particular circumstances will "almost certainly be both substantially overinclusive and underinclusive, granting significant benefits to many who did not need or deserve them and discriminating against many who badly merited greater solicitude." Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 125 (1990). The instant case is a manifestation of the very injustice prophesied by the dissent.

Under strict scrutiny review, the dissent demonstrated, the minority preference policy falls. The asserted government interest at issue, program diversity, is too "vague" and "amorphous" to justify the race-conscious measure utilized by the Commission. *Id.* at 3035. Justices Kennedy and Scalia also

found "disturbing parallels" in the majority's opinion to the "standard of review and its explication" in the notorious *Plessy v. Ferguson*, 163 U.S. 537 (1896), and they found particularly repugnant the "stereotypical assumption [implicit in the majority's opinion] that the race of owners is linked to broadcast content." *Id.* at 3044. Justice Kennedy's dissent concluded on a doleful note: "I regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign'." *Id.* at 3047.

By putting the Supreme Court's imprimatur on the idea of "benign discrimination" for the first time, the *Metro Broadcasting* majority introduced substantial uncertainty and instability into the law. If the principle of "benignity" is to be followed, its proper bounds must be demarcated. The facts of this case, differing from those before the Court in *Metro Broadcasting*, test the limits of that principle and hence require consideration at this juncture.

B. The Court of Appeals Erred In Refusing To Consider Galaxy's Challenge To The FCC's Minority Preference Policy

In its brief to the Court of Appeals, Galaxy urged that the FCC's minority preference policy was unconstitutional, notwithstanding *Metro Broadcasting*, because Anchor's minority composition was the only comparative factor on which Anchor surpassed Galaxy and yet it was the dispositive factor in Anchor's licensing victory. The court, in a passing footnote, refused to consider Galaxy's challenge to the policy because it "was not raised before the Commission." *Opinion* (App. A at 7a).

In so ruling, the court invoked 47 U.S.C. § 405. That statute makes a reconsideration petition a "condition precedent to judicial review . . . where the party seeking such review . . . relies on questions of fact or law upon which the Commission

... has been afforded no opportunity to pass." *Susan M. Bechtel* (App. A at 71).

Section 405 is the Communications Act's bow to the doctrine of administrative exhaustion, which requires generally that administrative agencies have the first opportunity to review a challenge in cases involving the scope of the agency's power and the constitutionality of its actions. *See Conley Electronics Corp. v. FCC*, 394 F.2d 620 (10th Cir. 1968), *cert. denied*, 393 U.S. 858 (1968); *Presque Isle TV Co. v United States*, 387 F.2d 502 (1st Cir. 1967).

The exhaustion doctrine is applied in circumstances where two administrative purposes will be served: "allowing agency expertise and discretion to be exercised and reducing the likelihood of additional litigation." *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990 (D.C. Cir. 1969). It is hornbook law, however, that the administrative exhaustion doctrine is not implicated in cases, such as the instant one, where to seek agency review would be a wholly futile exercise. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.6 (1983) (federal agency lacks power to pass upon a statute's constitutionality). Seeking agency review is a futile act when, *inter alia*, the issue involved is constitutional and "the Commission either would not or could not declare" that a statute (or a Congressionally mandated policy) is unconstitutional.[5] *See Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958); *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"). *See also* Jaffe,

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[5] *New York State Broadcasters Ass'n, supra*, at 994. That the congressional action at issue here is not a statute is not a relevant distinction. "[A]ppropriations acts, like any other laws, are binding because they are 'passe[d] [by] both Houses and ... signed by the President.'" *Metro Broadcasting*, 110 S.Ct. at 3016 n.29 (additional citations omitted).

Judicial Review: Questions of Law, 69 HARV. L. REV. 239, 271-275 (1955).

The instant case is a classic illustration of circumstances in which the administrative exhaustion doctrine should not be applied. During all times relevant to Galaxy's prosecution of its application, the FCC has been under an explicit and unequivocal edict from Congress not to revisit the minority preference issue, or even to spend any agency resources considering Galaxy's argument. Had Galaxy raised the issue, the FCC would have had no choice but to ignore it, or to resolve it against Galaxy. Indeed, requiring administrative exhaustion "would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975). Thus, Galaxy's challenge would have been a wholly futile act. Accordingly, the Court of Appeals' refusal to address Galaxy's argument because it was not raised before the Commission was error.

We note that *Southern Indiana Broadcasting, Ltd. v. FCC*, 935 F.2d 1340, 1342 (D.C. Cir. 1991), the only precedent relied upon by the Court of Appeals in refusing to consider Galaxy's constitutional challenge, is plainly inapposite. In that case, a party challenged on appeal an ALJ's refusal to admit certain deposition testimony. The appellant never complained of the ALJ's action before the FCC, and the Court of Appeals ruled that the party's failure to do so foreclosed judicial review of that question. Quite obviously, the matter involved an area over which the FCC, not the court, had primary jurisdiction and it was appropriate for the court to refuse to address the issue. Here, by contrast, precisely the opposite is true.

C. The FCC's Decision Did Not Rest on "Reliable" Evidence Where Anchor's General Partner Refused to Provide Critical Testimony.

This case also presents a significant question under the Administrative Procedure Act (APA) relating to the conse-

quences for the refusal of a party seeking a license from an agency to give evidence on the most important issue in the proceeding. Anchor's sole general partner refused to provide testimony essential to Anchor's claim to be the best qualified applicant, while adverting to the "amendment . . . about possible self-incrimination." Yet one who invokes the privilege against self-incrimination does not necessarily retain an undiminished right to a federal benefit. *See, e.g., Haine v. Department of the Navy*, 41 M.S.P.R. 462 (MSPB 1989). Therefore, the agency's grant of Anchor's application cannot rationally have been "supported by and in accordance with the reliable, probative and substantial evidence" as required by Section 556 of the Administrative Procedure Act, 5 U.S.C. § 556(d).

As explained above, for Anchor to be in contention for the Selbyville license, it was critical that Anchor demonstrate the likelihood that its plan for integration of its ownership into the management of the broadcast station would be fulfilled. In particular, in order for Anchor to match the 100% "quantitative" integration credit to which Galaxy was entitled, Anchor had to show that its "limited" partners were only passive investors, and would not even communicate with the general partner about the day to day operation of the radio station. *Decision* (App. B at 42a).

Dr. Herman Stamps, assertedly Anchor's sole general partner, admitted that all four Anchor principals had "naturally" intended to be active in the affairs of a station for which they had applied previously, in light of their extremely close social and business relationships. (App. B at 34a.) Accordingly, Dr. Stamps was questioned at the hearing about his partners' newly-adopted proposal for total passivity vis-a-vis the Selbyville station:

> Q. Well, what is your expectation about how the actual relationship among the partners is going to work?

A. Well, I'm afraid to answer that question because I know what is expected of me by law. Now, when you say talk about, well, you know, like somebody might yell down the street something and that might constitute talking about it. So I don't know how to answer that question according to the law.

I mean there's a real world, and then there's this.

Right here I am going by this.

Q. But in the real world you expect that you probably will have --

A. **I would not admit that any darn way.**

Q. Excuse me.

A. **I would never answer you on that one, sir.**

* * *

Q. But, realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station if you are having problems with a particular employee, or you wanted to change the format or anything like that, that you are going to end up talking to these partners about those things, if you happen to meet them in a social --

A. **I don't know which amendment there is about possible self incrimination, but I**

> **certainly wouldn't answer 'yes.'** I would stick to what this says. I always have control of the second side of communication.

Decision (App. B at 34a-36a).

The thrust of Dr. Stamps' testimony is clear. He plainly refused to answer direct questions concerning the expected working relationship among the Anchor principals. Just as clearly, a direct answer to the questions posed would have included an admission that his partners will talk to him about the business of the station -- an admission that would have vitiated Anchor's claim to 100% integration credit whether or not Dr. Stamps talked to them in response. The missing information renders the record incomplete as to Anchor's case, and precludes a rational determination that Anchor met its burden of proof.

The Court of Appeals evidently found it impossible to square with the requirements of the APA Dr. Stamps' refusal to testify completely on this key point. Even though Galaxy stressed this point in its briefs and at oral argument, the court's decision does not mention the APA's requirement for "reliable, probative and substantial evidence," nor does it mention the APA at all. The only analysis of Galaxy's contention is in the last sentence of a long footnote, and does not seriously deal with Galaxy's argument. Even there the fact that Dr. Stamps refused to answer certain questions altogether does not even appear. *Opinion* (App. A at 9a).

Given that Anchor's entire claim to parity with Galaxy on the quantitative aspect of the integration criterion rested on the complete "insulation" of its limited partners, a refusal to testify as to the applicant's internal relationships in the "real world" renders infirm under the APA any decision in favor of that applicant. Absent review by this Court, the requirement of the APA for "reliable, probative and substantial evidence" in agency decisions will be impaired.

CONCLUSION

The opinion of the *Metro Broadcasting* majority was grounded in a fact pattern unlike that posed by this case, and left unresolved the issue of the constitutionality of the FCC's minority preference policy under circumstances where the policy constitutes a *per se* preference. Because the "diversity" rationale of *Bakke* does not extend to this situation, the holding in *Metro Broadcasting* cannot properly determine the resolution of the issue here. Guidance from the Court is necessary to settle the uncertainty and instability created by this void in the *Metro Broadcasting* rationale.

Even more fundamentally, however, a serious question exists as to the validity, under any circumstances, of the "diversity" rationale in the context of broadcast licensing. Accordingly, the Court may wish to take this opportunity to reevaluate the *Metro Broadcasting* majority's conceptual premises.

Additionally, the Court of Appeals' failure to address an FCC applicant's refusal to give testimony crucial to the development of "reliable" evidence, in abrogation of an express requirement of the Administrative Procedure Act, creates an indefensible precedent in an important area of administrative agency law. That error should be rectified by this Court.

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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April 30, 1992

APPENDIX A

[957 F.2d 873]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 25, 1991 Decided January 31, 1992

No. 91-1112

SUSAN M. BECHTEL,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

ANCHOR BROADCASTING LIMITED PARTNERSHIP,
INTERVENOR

No. 91-1116

GALAXY COMMUNICATIONS, INC.,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
APPELLEES

ANCHOR BROADCASTING LIMITED PARTNERSHIP,
INTERVENOR

Appeal from Orders of the
Federal Communications Commission

Barry D. Wood, with whom *Ronald D. Maines* was on the brief, for appellant Galaxy Communications, Inc., in 91-1116.

Gene A. Bechtel for appellant Susan M. Bechtel in 91-1112.

David Silberman, Counsel, Federal Communications Commission, with whom *Robert L. Pettit*, General Counsel, and *Daniel M. Armstrong*, Associate General Counsel, were on the brief, for appellee in 91-112 and 91-1116.

Lewis I. Cohen and *Roy W. Boyce* were on the brief for intervenor Anchor Broadcasting Limited Partnership in both cases.

Before: WALD, SILBERMAN, and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Two unsuccessful applicants for a new FM radio station appeal an FCC grant of the license to their competitor Anchor Broadcasting Limited Partnership. One key criterion upon which the Commission relied to award the license to Anchor was Anchor's degree of "integration" of ownership into management. Galaxy Communications, Inc.'s primary challenge is to the *bona fides* of Anchor's integration proposal, whereas Susan M. Bechtel contends that regulatory changes since 1965, when the Commission first formally adopted the integration criterion, have made its continuing use arbitrary and capricious. We reject Galaxy's claims but think the Commission is obliged openly to confront Bechtel's challenge. We therefore remand to the Commission so that it may do so.

I.

In considering competing applications for a radio license, the FCC is charged with determining which of the competing applications would best serve "the public interest, convenience, and necessity." 47 U.S.C. § 309(a). The Commission has long structured these determinations according to its 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965) (*1965 Policy Statement*). In the *1965 Policy Statement*, the Commission defined the public interest in terms of two broad objectives: providing the "best practicable service to the public" and securing the "maximum diffusion of control of the media of mass communications." *Id.* at 394. The *1965 Policy Statement* set forth a list of six principal factors (not necessarily exclusive) that it said furthered these objectives. *See id.* at 394-99.

Two of these factors, integration of ownership into management and efficient use of frequency, or comparative coverage, are implicated in this case. By integration, the FCC means the full-time participation by owners of a radio station in its management. For purposes of calculating the degree of credit an applicant gets for integration, the FCC measures the percentage of total ownership in the hands of full-time managers. *See id.* at 395. Comparative coverage, on the other hand, focuses on the engineering proposals for the station itself. *See id.* at 398-99. Normally, the FCC will prefer an applicant whose proposed signal will reach a larger geographic area or a larger listening population. *See, e.g., Susan S. Mulkey*, 4 F.C.C.R. 5520, 5523 (1989).

In recent years, the FCC has permitted applicants to gain full credit for integration notwithstanding the presence of passive owners so long as these owners are sufficiently insulated from station business and "have no authority to control the licensee." *Anax Broadcasting, Inc.*, 87 F.C.C. 2d 483, 488 (1981). *See generally Attribution of Ownership Interests*, 97 F.C.C. 2d 993, 1021 (1982), *on reconsideration*, 58 Rad. Reg. 2d (P&F) 605, 613-20 (1985), *further clarified*, 1 F.C.C.R. 802 (1986). This permits applicants to attract capital from passive investors without sacrificing the opportunity to gain full integration credit.

In this case, four applicants filed mutually exclusive proposals for a new, low power, FM commercial radio license to serve approximately 35,000 people in Selbyville, Delaware, and Ocean City, Maryland. The successful partnership, Anchor, consists of four partners, three limited and one general, all of whom own equal shares and have been close friends for 25 years. All four are black. None has ever resided in the service area of the proposed station, and none has any prior experience operating a radio station. The general partner, Dr. Herman Stamps, is a retired dentist who has not worked since his retirement. For the past several years, he has traveled abroad several times a year and maintained three residences along the eastern seaboard, as well as a yacht. Dr. Stamps testified that if awarded the license, he would move his permanent residence to Selbyville and work full time during the week at the station as its general manager. In addition, he and his partners pledged in writing that the limited partners would exercise no control over the operations of the station and would not participate in its management. Under Anchor's engineering proposal, the Selbyville station would reach 33,350 people over 920 square kilometers.

Appellant Galaxy is a corporation owned entirely by Alexander Soroka, a retired employee of Westinghouse with no previous broadcasting experience. He is chairman and president of the corporation, and Gregory Walls, who is the controller of a broadcasting company, serves as secretary-treasurer and a director. Mr. Soroka moved to Selbyville around the time he filed his application and claimed 100% integration credit based on his promise to spend at least 40 hours per week working as the full-time general manager of the station. Mr. Soroka denied that his son, a radio engineer, or Mr. Walls would exert substantial influence on his operation of the station. Galaxy's engineering proposal would serve a population of 39,753 over 1,192 square kilometers.

The other appellant, Susan M. Bechtel, whose husband is an experienced communications attorney, lives in Potomac, Maryland, but has vacationed in the proposed service area--where she has a summer house--for approximately 40 years. She, like

Dr. Stamps and Mr. Soroka, has no broadcasting experience, but she did not propose to manage the day-to-day operations of the station herself and so did not claim, integration credit; rather, she stated that she would hire an experienced general manager to run the station under her general supervision. Ms. Bechtel would consult with her husband and with other friends who are experienced broadcasters. Under her engineering proposal, the station would serve 40,465 people over 1,200 square kilometers.[1]

Although Bechtel was clearly superior to Anchor regarding comparative coverage, serving approximately 21% more people, the ALJ thought Bechtel entitled to only a "'very slight'" preference, because the absolute number of people involved was small and the service area was already well served by five or more stations. *See Anchor Broadcasting Limited Partnership*, 4 F.C.C.R. 5687, 5691 (ALJ 1989) (quoting *Resort Broadcasting Co., Inc.*, 41 F.C.C. 2d 640, 647 (Rev. Bd. 1973)). This factor was overwhelmed by the 100% integration credits awarded to both Anchor and Galaxy. The Administrative Law Judge (ALJ) found that the evidence in the record suggested that the principals of both applicants would follow through on their promises to move to Selbyville and work full time at the station, without communication from or control by their passive investors or family members. *See id.* at 5691-92. The resulting tie between Anchor and Galaxy

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[1] The fourth applicant, Selbyville Broadcasting Co., Inc. (SBC), did not seek review. To provide context, we note that SBC was a corporation whose sole owner and officer was Rita Capobianchi. Ms. Capobianchi is a 25% owner of her husband's communications consulting engineering firm and works full time as its director of operations. She has no broadcasting experience and lives with her family, including three school-aged children, in suburban Maryland. SBC claimed credit for 100% integration. In the event her application were granted, Ms. Capobianchi promised that she would resign her position in her husband's company, move to Selbyville, and work at the station full time as its general manager, possibly returning to her family on weekends. Her husband would not have provided advice or assistance in operating the station. SBC's engineering proposal would have provided coverage to 33,644 people over 931 square kilometers.

was broken in Anchor's favor largely because Anchor's owners were black.[2] *See id.* at 5692.

The Review Board reversed the ALJ's award of the station to Anchor, awarding it instead to Galaxy. *See Anchor Broadcasting Limited Partnership*, 5 F.C.C.R. 2431 (Rev. Bd. 1990). The Board found that Anchor had failed to carry its burden to establish the reliability of its integration proposal. Dr. Stamps' pledge to move to Selbyville and work full time at the station was thought difficult to reconcile with evidence of his ownership of several homes, his unwillingness to commit to selling any of them, and his lack of a home in Selbyville. *See id.* at 2437. The Board also said that "the record here is decidedly unpersuasive that Anchor's limited partners intended to be barred absolutely from substantive communications about station management, or are likely to remain wholly insulated in practice." *Id.* at 2436. Portions of the record indicated that the three limited partners had been "keenly active" with respect to a previously applied-for FM facility, and one had manifested a lack of awareness of the provision in the limited partnership agreement prohibiting communications with Dr. Stamps about station business. *Id.* at 2436-37. The Board also pointed to passages from the record that suggested some of Dr. Stamps' responses to questions about insulation were crafted for hearing purposes only.[3] *See id.* at 2437. The Review Board noted Ms. Bechtel's "unorthodox exceptions" regarding the continued viability of the integration criterion but did not address them, saying only that it lacked authority to grant the relief she sought. *Id.* at 2439 n.3.

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[2] The quantitative integration credit may be qualitatively enhanced by a variety of factors, one of which is race. *See West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604-07 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

[3] For instance, when asked how he expected his relationship with his partners to work, Dr. Stamps responded, "Well, I am afraid to answer that question because I know what is expected of me by law. . . . I mean there's a real world, and then there's this. Right here I am going by this." Asked whether he expected to converse with his partners about station affairs, Dr. Stamps added, "I don't know which amendment there is about possible self-incrimination, but I certainly wouldn't answer 'yes'."

The Commission reversed the Review Board and reinstated Anchor as the victorious applicant, determining that the record as a whole adequately supported the ALJ's conclusion that the limited partnership was *bona fide* and that the partners understood their various promises and obligations and intended to fulfill them. *See Anchor Broadcasting Limited Partnership*, 6 F.C.C.R. 721, 722 (1991). The Commission addressed and rejected Ms. Bechtel's argument that the "preference for integration is discredited and should not be applied in this proceeding" in a footnote. *See id.* at 724 n.4. It stated that "Anchor's principal is committed to fulfilling his integration commitment.... In any event, such a change in the comparative criteria would more appropriately be considered in a rule making proceeding." *Id.* Galaxy and Bechtel then appealed to this court.

II.

Galaxy's principal challenge[4] to the FCC's decision is that the Commission's award of 100% integration credit to Anchor "cannot be squared with any reasonable construction of the record evidence." Galaxy argues that the FCC is bound under its precedents to find that Anchor's proposal was a sham, both because Dr. Stamps will not serve as a full-time manager of the station and because his limited partners will not be insulated sufficiently from station business to qualify for exemption from ownership attribution under the Commission's rules. Essentially, Galaxy urges upon us the same analysis of the record that the Review Board accepted. But we owe deference to the Commission's determination, not to that of the Review Board, especially where, as here, the Commission's views of factual and credibility

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[4] Galaxy's claim that Anchor's minority preference was unconstitutional, notwithstanding *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), because it was the dispositive factor in Anchor's licensing victory in this case was not raised before the Commission, so we may not consider it. *See* 47 U.S.C. § 405(a); *Southern Indiana Broadcasting, Ltd. v. FCC*, 935 F.2d 1340, 1342 (D.C. Cir. 1991). And its contention that the FCC should have broadened the hearing to determine whether Anchor's partners had truthfully represented that they had an oral agreement to contribute sufficient funds to finance the construction and operation of the station seems to us to be without any merit.

issues accord with those of the ALJ. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496-97 (1951).

Under Commission integration rules, a station owner is integrated into management when his involvement amounts to "full-time active participation in day-to-day operations," *Berryville Broadcasting Co.*, 70 F.C.C. 2d 1, 6-7 (Rev. Bd. 1978), and his limited partners are sufficiently insulated to be excluded from the integration calculation if they exert "no influence or control over the licensee" and have no material involvement in station management or operation. *Ownership Attribution*, 97 F.C.C. 2d at 1022-23. The applicant advancing an integration proposal carries the burden of allaying any substantial doubts that may arise concerning the likelihood of effectuating his proposal. *See Knoxville Broadcasting Corp.*, 103 F.C.C. 2d 669, 687 (Rev. Bd. 1986).

When considering integration proposals, the Commission focuses upon actual, not nominal, patterns of control and involvement. *See Royce Int'l Broadcasting*, 5 F.C.C.R. 7063, 7064 (1990). But to raise a substantial doubt about whether the nominal control established in a partnership agreement is *bona fide*, a person challenging an integration proposal bears a burden of production: a written agreement will not ordinarily be disregarded absent evidence that the agreement has been ignored or is otherwise a sham. *See KIST Corp.*, 102 F.C.C. 2d 288, 291 n.8 (1985), *aff'd mem. sub nom. United American Telecasters, Inc. v. FCC*, 801 F. 2d 1436 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1050 (19887); *Cleveland Television Corp. v. FCC*, 732 F. 2d 962, 969 (D.C. Cir. 1984).

The FCC concluded that the written covenants in Anchor's limited partnership agreement and the testimony of the Anchor partners established *de jure* legal authority consistent with FCC integration and insulation requirements and a credible commitment to act in accordance with that authority. This determination is supported by substantial evidence on the whole record. All of the Anchor partners testified candidly, according to the Commission, and all testified that they would carry out their

promises pertaining to integration. Dr. Stamps pledged to move to Selbyville and manage the station, and his limited partners promised they would not talk about station business with him and would not be involved in the day-to-day operations of the station. The portions of testimony Galaxy relies on to contradict these representations are, for the most part, either irrelevant or subject to more than one reasonable interpretation.[5] Notwithstanding Galaxy's suggestion at oral argument that we review the FCC's inferences and conclusions based on this record *de novo*, we accord substantial deference to the Commission's resolution of factual disputes and credibility questions. *See WEBR, Inc. v. FCC*, 420 F. 2d 158, 106, 162-63 (D.C. Cir. 1969). Galaxy's challenge really goes to the credibility of Anchor's partners, and the ALJ who heard them testify chose to believe their explicit promises to operate the station in a fully integrated fashion.[6]

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[5] That the four Anchor partners are close friends who previously sought a broadcast license as full partners, for example, could, as Galaxy argues, suggest that they will collaborate in running the station and speak of station business when they see each other socially. But one could equally regard the friendship and the prior venture as irrelevant if one credits the partners' testimony that they intend to abide by the insulation provision in the limited partnership agreement. Similarly, Dr. Stamps' discussion of his Virginia domicile and tax status could be thought to belie his claim that he intends to move to Selbyville permanently if awarded the license, but one could also interpret Dr. Stamps' testimony as pertaining only to his *current* living arrangements. And Dr. Stamps' allusions to the privilege against compulsory self-incrimination and to differences between the "real world" and the partnership agreement can reasonably be regarded as the overly careful responses of a witness worried about unforeseen hypotheticals during cross-examination.

[6] Galaxy also claims that an oral side agreement on financing between the Anchor partners destroys limited liability under Delaware partnership law and requires the Commission to treat the Anchor partnership agreement and the promises it contains as a nullity; however, the Commission's judgment that an integration proposal is bona fide does not depend on the "formalities of state law." *Signal Ministries, Inc.*, 104 F.C.C. 2d 1841, (Rev. Bd. 1986), *rev. denied*, 2 F.C.C.R. 1259 (1987), *aff'd mem. sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F. 2d 571 (D.C. Cir. 1988); *see also Marlin Broadcasting v. FCC*, No. 90-1517, slip op. at 10 (D.C. Cir. Jan. 7, 1992).

Nor is the FCC's award of full integration credit to Anchor inconsistent with Commission precedent. The cases cited to us by Galaxy, in which the Commission denied integration credit, involved much stronger evidence that an integration proposal was fictional. For example, in *Doylan Forney*, 3 F.C.C.R. 6330 (Rev. Bd. 1988), *rev. denied*, 5 F.C.C.R. 5423 (1990), one applicant's limited partners were Washington communications attorneys who had initiated and prosecuted the applications from start to finish, and the managing partner, a Ms. Arroyo-Duron, had almost no knowledge of the partnership agreement, the business plan, the budgets, or her anticipated role in the organization. *See id.* at 6331-32. With regard to another applicant, the limited partners enjoyed a exclusive power to terminate the partnership by simple majority vote, without the concurrence of the general partners. See id. at 6332. And in a third, a 49% voting shareholder who proposed to run the station full time was a 21-year-old housekeeper with no prior business experience who had not participated in any of the important decisions regarding the application and who had little knowledge of what running a radio station entailed. *See id.* at 6333. Here, Dr. Stamps, the general partner, was in full control of the application, and we see no evidence indicating that he is merely a front for his limited partners.

Similarly, the cases Galaxy relies on for the proposition that the FCC must deny Anchor integration credit because Dr. Stamps' lifestyle is inconsistent with his proposed full-time employment involve much weightier evidence that the "integrated" partner's commitment was inconsistent with other prior obligations, which made it factually or legally impossible to credit the applicants' representations that they would work full time at the station. *See, e.g., Leninger-Geddes Partnership*, 2 F.C.C.R. 3199, 3199-3200 (Rev. Bd. 1987), *rev. denied*, 3 F.C.C.R. 1181 (1988); *Knoxville Broadcasting Corp.*, 103 F.C.C. 2d 669 (Rev. Bd. 1986). No one disputes Dr. Stamps' ability to adhere to his commitments to work full time in Selbyville, if he so wishes.

We therefore conclude that the Commission was entitled to credit Anchor's integration proposal.

III.

The FCC explained its adoption of the integration criterion in the *1965 Policy Statement* by saying that radio service to the public would be enhanced by merging "legal responsibility and day-to-day performance." *1965 Policy Statement*, 1 F.C.C. 2d 393, 396 (1965). The FCC predicted that the programming of a station with integrated management would reflect "greater sensitivity to an area's changing needs, and [would be] designed to serve those needs." *Id.* The Commission has never explained this further, either in the *1965 Policy Statement* or at any time thereafter, including in this proceeding. The Commission has not spelled out *why* any owner/manager will be more sensitive to community needs than an owner who hires a professional manager. It might be thought that an owner/manager would likely live in the community being served, but the integration credit is awarded whether or not the owner/manager lives in the community.[7] And a professional manager is no less likely to live in the community served by his station than is an owner/manager.

Nonetheless, Ms. Bechtel does not challenge the adequacy of the original justification for the integration criterion. Instead, she contends that, assuming it was reasonably developed, the integration criterion no longer serves its stated objectives. According to Ms. Bechtel, subsequent regulatory events have made the Commission's continued emphasis on "integration" arbitrary and capricious.

In 1981 the Commission began to exempt passive owners from the integration calculation if the passive owners agreed to exert no influence or control over the licensee. *See Anax Broadcasting, Inc.*, 87 F.C.C. 2d at 488. *See generally Attribution of Ownership Interests*, 97 F.C.C. 2d at 1021, *on reconsideration*, 58 Rad. Reg. 2d (P&F) 604, 613-20 (1985), *further clarified*, 1

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[7] To be sure, the integration credit can be qualitatively enhanced if the owner/manager lives in the community, *see 1965 Policy Statement*, 1 F.C.C. 2d at 395-96, but is basic rationale cannot depend on that factor since it operates independently of the owner's residence.

F.C.C.R. 802 (1986). This made it possible for an applicant to receive 100% credit for integration of ownership into management even when, as with Anchor, only a fraction of total ownership was actually represented in management. The following year, the Commission began to permit licensees to sell their stations without a hearing after operating them for only a year. *See* 47 C.F.R. § 73,3597(a); *Transfer of Broadcast Facilities*, 52 Rad. Reg. 2d (P&F) 1081, 1086-87 (1982). At the time the *1965 Policy Statement* was adopted, the minimum holding period was three years, *see Applications for Voluntary Assignments or Transfers of Control*, 32 F.C.C. 689, 692 (1962), and the Commission had explicitly noted "it is important that integration proposals be adhered to on a permanent basis." *1965 Policy Statement*, 1 F.C.C. 2d at 395 n.6.

After these changes, an applicant largely financed by passive investors, but who promised to manage the station, could qualify for full integration credit, get the license for that reason, and then, after only a year, turn around and sell it to anyone without regard to the buyer's "integration" or lack thereof. Whatever the original rationale supporting the integration criterion, these two regulatory changes would, therefore, appear to eviscerate it.

Taken together, these developments induce what Ms. Bechtel characterizes as "shotgun marriage[s] of the most tenuous kind" between people with capital and people promising to run a station full time. These marriages, Ms. Bechtel points out, do not last. Lured by the prospect of the quick profits to be made from selling the station after a year, when its market value often far exceeds the costs sunk into acquiring and constructing it, speculators organize special corporations or partnerships to compete for a particular license and then sell out as quickly as possible to professional broadcasters. Even when integration proposals are not "shams" in the sense that applicants are lying about their intentions or that passive or silent partners are truly in control, Ms. Bechtel argues that the proposals frequently involve "strange and unnatural" business arrangements. In our case, for example, best friends and co-owners of a station swear

not to consult with each other; family members with valuable broadcast knowledge and experience agree not to assist the tyro station manager in the family; people with steady jobs and families in one city pledge to leave them and move permanently to another; and wealthy retirees promise to move to and work in small summer towns in Delaware with which they have no former connection. The case of *Debra D. Carrigan*, in which, according to Ms. Bechtel, the successful integration applicant contracted within five months to sell the station for over $4 million to a group broadcaster, is allegedly but one illustration of the end result. *See Debra D. Carrigan*, 100 F.C.C. 2d 721 (Rev. Bd. 1985), *rev. denied*, 104 F.C.C. 2d 826 (1986), *aff'd sub nom. Bernstein/Rein Advertising, Inc. v. FCC*, 830 F.2d 1188 (D.C. Cir. 1987).

In these proceedings, Ms. Bechtel has asked the Commission to explain its continued adherence to the integration criterion in light of these regulatory changes and to consider whether her proposal to build a station that would serve 21% more people and to hire a professional station manager to run it would serve the public interest better than her competitor's integrated proposals. This the Commission has consistently refused to do. She challenged both the FCC and her competing applicants to point to any cases, over the last 10 years, in which a licensee prevailed in a comparative hearing based upon its integration proposal and then actually constructed and operated the station in conformity with that proposal for a period substantially exceeding one year. Neither the FCC nor her competitors offered a single example. Indeed, during the approximately 26 years in which the integration of ownership into management has been an important criterion in comparative licensing proceedings, there is no instance of which we are aware in which the FCC has publicly examined its effectiveness.

The only response to Ms. Bechtel's serious arguments was presented in a footnote at the final level of Commission review. But the footnote did not address the substance of her argument that the criterion itself was flawed; it said only that the criterion had been applied properly in this case and that any reconsideration of the criterion "would more appropriately be

considered in a rule making proceeding." *Anchor Broadcasting Limited Partnership*, 6 F.C.C.R. at 724 n.4. On appeal, the FCC has defended the integration criterion by insisting in conclusory fashion that "[t]he *Policy Statement* was designed to bring order, clarity and consistency to the comparative process. Given Ms. Bechtel's contention that the reality of the current regulatory environment is at odds with whatever policy originally supported integration preferences, she is entitled to a fuller explanation.

The FCC nevertheless argues that it is under no duty to explain its continued adherence to settled policy; it claims that it must only explain *changes* in policy or departures from prior precedent. While the Commission is correct that changes of policy require a rational explanation, it is also true that changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach "if a significant factual predicate of a prior decision... has been removed." *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981); *see also American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987); *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979) (per curiam). The Commission's duty is even more pressing when the policy is embodied not in a binding regulation issued after public notice and comment but in a general statement of policy such as the *1965 Policy Statement* at issue here. *See Pacific Gas & Elec. v. PFC*, 506 F.2d 33, 38-40 (D.C. Cir. 1974). The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise, *see FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978), implies a correlative duty to evaluate its policies over time to ascertain whether they work -- that is, whether they actually produce the benefits the Commission originally predicted they would. *Cf. FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981). ("[T]he Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully."). As we have previously said:

> When the agency applies [a general] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

Pacific Gas, 506 F.2d at 38-39.

Accordingly, the Commission must demonstrate why its focus on integration is still in the public interest, if indeed the Commission concludes that it is. Although FCC counsel at oral argument told us that the Commission is currently rethinking the issue of integration of ownership and management on its own initiative, *Pacific Gas* makes clear that the Commission must nonetheless be prepared to explain and justify general policies not embodied in a regulation when they are properly challenged in a specific case. *See id.* The cases relied on by the FCC for the proposition that it can refuse to address Ms. Bechtel's arguments in this proceeding are not on point. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), and *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984), merely stand for the proposition that an agency may, in its discretion, choose to make new policy through either rulemaking or adjudication. *See Bell Aerospace*, 416 U.S. at 294; *New York State Comm'n*, 749, F.2d at 815. We do not question that discretion; we are not directing the Commission to use a particular procedural mode or even to use any at all. We are simply instructing the FCC to respond to Ms. Bechtel's challenges and to consider her application in light of those challenges. If the Commission decides it wishes to change its policy, whether at Ms. Bechtel's urging or that of its staff, it is free to do that however it wishes.

It is so ordered.

APPENDIX B

[6 FCC Rcd 721]

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
SELBYVILLE BROADCASTING CO., INC.	File No. BPH-860918MB
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for a new FM Station on Channel 250A in Selbyville, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1991; Released: February 8, 1991

By the Commission:

1. This Memorandum Opinion and Order overturns a Review Board Decision, *Anchor Broadcasting Limited Partnership,* 5 FCC Rcd 2432 (Board Chairman Marino dissenting), which granted the application filed by Galaxy Communications, Inc. for a new FM Station at Selbyville, Delaware, and instead reinstates, the ALJ's grant of the application filed by

Anchor Broadcasting Limited Partnership. *Anchor Broadcasting Limited Partnership,* 4 FCC Rcd 5687 (ALJ 1989). Now before the Commission are Applications for Review filed May 30, 1990 by Anchor. Selbyville Broadcasting Company (SBC) and Susan M. Bechtel;[1] and a Contingent Application for Review, filed May 31, 1990 by Galaxy.[2] The Applications for Review filed by SBC.[3] Bechtel[4] and the Contingent Application for Review filed by Galaxy will be denied.

2. Anchor is a limited partnership. It claims 100 per cent credit for the integration of its general partner. Dr. Herman Stamps. Stamps and Anchor's three limited partners, Dr. Ridgley C. Bennett, R. Kenneth Mundy and Dr. Francis L. Smith, each own a 25 per cent equity interest in the applicant. The ALJ credited Stamps' integration proposal. 4 FCC Rcd at 5691 ¶¶ 40-41. The Board, however, found that Anchor's limited partners would not be insulated form the involvement in the management of the applicant; that there was a variance from the terms of the limited partnership agreement; that other evidence raised questions concerning the realizability of Stamps' pledge to move to Selbyville and be integrated into the management of the proposed station; and that no credit was warranted for Anchor's integration proposal. 5 FCC Rcd at 2432-37 ¶¶ 5-27. As set forth below, we find that the Board erred in refusing to credit Anchor's integration proposal, and we grant Anchor's application.

3. *Anchor's Integration:* The Board found that Anchor's limited partners would not be insulated from the conduct of the station's business by its general partner. The Board cited the involvement of Anchor's principals as equal partners in an application for an FM facility in Washington D.C.[5] and it found that the change in the organizational format from a full partnership in the WOOK proceeding to a limited partnership in the instant proceeding, was a "paradox" and not "cogently explained." 5 FCC Rcd at 2433 ¶ 9 and 2436 P 23. The Board also cited the friendship between the partners: Stamps' testimony concerning how he would treat the insulation requirements; and testimony from Mundy that he was unaware

of any restriction on discussing station business with Stamps. 5 FCC Rcd at 2433-44 ¶ 10-12.

4. The ALJ concluded that Anchor's limited partners would be insulated form involvement in the management of the application. We agree with that conclusion. The fact that Anchor's principals used a different organization in WOOK proceeding is not significant. Anchor's principals explained why they adopted the limited partnership arrangement in this case. Stamps testified that the is the general partner because he is retired and has time to manage the station. He further explained that he has acquired a library on broadcasting and visited stations to develop a personal knowledge of broadcasting, whereas the limited partners are actively pursuing their professions, have not developed the same expertise in broadcasting, and do not have the same amount of time to devote to a broadcast station. Stamps also testified that he limited partnership allows Anchor to earn full integration credit, and that because he has authority to manage the applicant, the other principals chose to limit their liability by becoming limited partners. Tr. 160-61. Stamp's testimony was confirmed by Mundy. Mundy testified that Anchor's principals formed a limited partnership because Stamps is retired while he, Bennett and Smith are still fully involved with their professions and that Stamps has a greater interest in ("appetite for") broadcasting. Tr. 270-73.

5. The Board found that Stamps was reluctant to testify concerning how the relationship between the partners would work, and that this raised questions concerning the reliability of Anchor's integration commitment. 5 FCC Rcd at 2433-34 ¶¶ 11-12 and 2437 P 23; Tr. 151-153. However, the Board took Stamps' testimony out of context and it failed to consider that, although Stamps recognized that the relationship between the partners made it difficult to insulate them from the proposed station's business, he will adhere to the insulation requirements. Tr. 150-153. Stamps testified that:

Q. And you expect to remain friends of the other partners after Anchor is awarded the permit for this station?

A. I hope so.

Q. And you would still expect to be able to talk with them about the business of the station?

A. In the language of the agreement. I understand I am not supposed to accept their consultation or seek it, or anything else that concern (sic) day to day matters of the station....

Q. Well, what is your expectation about how the actual partnership among the partners is going to work?

A. Well, I am afraid to answer that question because I know what is expected of me by law. Now, when you say talk about, well, you know, like somebody might yell down the street or something and that might constitute talking about it. So I don't know how to answer that question according to the law.

I mean there's a real world, and then there's this. Right here I am going by this.

Q. But in the real world you expect that you probably will have --

A. I would not admit that any darn way.

Q. Excuse me?

A. I would never answer you on that one sir. (Tr. 150-151).

****

Q. But you intend to talk to him [Dr. Smith] about the business of the station, don't you?

A. Not according to this, no. This says nor shall [there be] any communication between the general partner or the partnership on matters of day to day operations.

Now, you can talk about the outside of the business but not day to day operations of this or any other media enterprise. I think I understand the restrictions....

Q. But realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station...?

A. I don't know which amendment there is about self incrimination, but I certainly wouldn't answer "yes." I would stick to what this says. I always have control of the second side of communication. (Tr. 1523-153).

****

A. Well, when I signed ... this document I signed myself to live under this provision. I don't see a restriction here as awkward as it

> may apparently be [as] any different from SEC's regulations dealing with inside trading or anything else. A lot of these things must be controlled by laws I have to subscribe to. This is what I want. I can live with them. (Tr. 254-155).

6. The ALJ after listening to this testimony found that Anchor's partners were aware of and would adhere to the insulation requirements of the limited partnership agreement. 4 FCC Rcd at 5688 P 10. The testimony establishes that Stamps was candid and recognized that because of his friendship with the limited partners it would be difficult to adhere to the insulation requirement. However, Stamps testified that in spite of the those difficulties he would adhere to the insulation requirements. Thus, we find that the record as a whole supports a finding that Stamps will adhere to the insulation requirements.

7. It is also clear that the other partners accepted the restrictions imposed on the involvement of limited partners in station affairs. Although Mundy testified that he was unaware of a written prohibition against discussing station matters with Stamps (Tr. 266), he also testified that he will not talk about station business with Stamps and that he will not get involved in the day to day operation of the station. Tr. 269-70. Smith and Bennett testified that they understand the terms of the partnership agreement and will adhere to them. Tr. 298-99 and 314-15. We find that Anchor's limited partners have demonstrated that they understand their obligations and intend to remain insulated from involvement in the management of its proposed station.[6]

8. Galaxy argues that Stamps will not be integrated on a permanent basis. In reply to a question from the ALJ, Stamps testified that he intended to be integrated for the foreseeable future. Tr. 127. Subsequently, Stamps testified that the foreseeable future was two to three years. Tr. 133.

Galaxy seizes upon this testimony to argue that Stamps' commitment is too temporary in nature to be credited.

9. We do not agree. It is clear from Stamps' testimony that he did not view the future as capable of being foreseen beyond a period of two to three years, rather than stating an intention that his commitment would expire at the end of that time period. The clear import of Stamps' testimony was that his integration commitment has no fixed duration. Thus, Stamps testified:

> A. My expectations are to continue to work the station and develop it.
>
> Q. But you are not necessarily going to be bound to eight hours a day everyday forever, are you?
>
> A. Why not? Within reason. I mean within reason of retirement or sickness, health. Have no reason not to.
>
> Q. When do you think you would be likely to retire from this position?
>
> A. I have no idea.
>
> Q. So it could really happen at any time, couldn't it?
>
> A. You can drop dead in five minutes.
>
> Judge Chachkin: But barring illness or death, do you intend -- it is your intention to remain as general manager for the foreseeable future?
>
> A. Yes, sir.

Tr. 126-127. When specifically asked about his commitment to work at the station, Stamps indicated that there was no reason not to expect him to be at the station indefinitely. Thus, the preponderance of the evidence establishes that he does not intend to limit his integration commitment to two or three years.

10. *Local Residence:* Stamps owns residences in Washington, D.C., Ladysmith, Va. and Cape Cod, Mass. and a yacht at Baltimore, Md. Stamps testified that he maintains the residence at Ladysmith as a tax domicile. Finding no intention by Stamps to forsake his Virginia "tax domicile," and citing testimony that Stamps plans to "be pretty much in the capital area" and that he does not want to commute on weekends, the Board refused to credit Stamps' pledge to move to Selbyville. Tr. 71-71; 5 FCC Rcd at 2434-35 ¶¶ 14-25.

11. In direct testimony Stamps clearly and unequivocally stated that he intends to reside in Selbyville. Thus, he testified that:

> I will be the full-time General Manager of Anchor's proposed station . . . I will devote a minimum of forty (40) hours per week, Monday through friday, and additional time if needed . . . I will reside in Selbyville or within Anchor's proposed city grade contour....

Anchor Ex. 2. pp. 2-3.

12. The cross examination cited by the Board was taken out of context and did not undermine Stamps' testimony. Thus, Stamps testified:

> Q. Now I notice in your exhibit ... you state that you will reside in Selbyville or within the proposed city grade contour. Monday through Friday.... *Where do you intend to be on your weekends if not on your boat?*

> A. ...it is presumptive as to where I would be on Saturday and Sunday. I might be totally in residence in the Selbyville area. I don't know.
>
> Judge Chachkin: Well lets put it more bluntly. Will you maintain a residence *somewhere else beside the Selbyville area?*
>
> A. I don't know. I have several residences now, and what -- and whether I would confine my living -- I don't see commuting, going up and down the road every weekend, so that I have a place in Virginia, a place in D.C. I have a place in Maryland, and I have a place in Delaware. I think I would probably be pretty much in [the] capital area. I think other areas would be visitation.

Emphasis added. Tr. 71-72. The testimony relied on by the Board related to what Stamps would do on weekends, and does not contradict his testimony that he will reside in Selbyville in connection with his full-time management of the station. Moreover, Stamps testified that he no longer uses his house at Cape Code or his yacht, and that he will sell the yacht and "get a boat more suitable for the water around Selbyville . . " (Tr. 74-75) and he reaffirmed his commitment to move to Selbyville. Tr. 140-141.

13. Nor is Stamps' intention to move to Selbyville called into question by the statement that his "principal residence for tax purposes is Virginia." Tr. 72. As the Board noted, Stamps admitted that Ladysmith, Virginia is his *current* domicile, and that for Virginia law he must be there for "six months and a day." Tr. 74. That statement about his domicile was in response to a question concerning whether his *current* principal residence is in Washington, D.C. Nowhere, however, has Stamps indicated any hesitancy about changing that domicile. Thus, while the Board took official notice of the

differing tax rates, and Galaxy argued that the differing tax rates are significant, there is nothing in the record that would support a finding that those tax rates are so significant that they would affect Stamps' commitment to move to Selbyville, or that Stamps intends to continue living in Ladysmith for at least six months a year after a license is granted. Any suggestion that Stamps' future residence will be determined by state tax rates is based on speculation in light of the record support for the finding that Stamps will move to Selbyville. *See* 4 FCC Rcd at 5689 ¶ 15.[7]

14. *Variance from the Limited Partnership Agreement:* The terms of Anchor's Limited Partnership Agreement limits the financial responsibility of Anchor's limited partners, and the agreement further provides that it represents the entire agreement between the parties, unless the agreement is subsequently amended by a written agreement. At the time that the applicant certified its financial qualifications, Anchor's principals entered into a separate oral agreement to provide additional funding for financing the construction and operation of its proposed station. Galaxy argues that the agreement for additional financing is inconsistent with the Limited Partnership Agreement, and is evidence that Anchor's principals will be willing to disregard other terms of the agreement, including the provisions insulating the limited partners form involvement in the management of the applicant. The Board said that, although there is an "apparent variance," that variance is entitled "to only slight evidentiary weight as regards Anchor's 'integration' proposal." 5 FCC Rcd at 2435 ¶ 19.

15. The limited partnership agreement strictly limits the liability of Anchor's limited partners to their initial investment of $21,250 per partner. That commitment alone, is insufficient to finance Anchor's proposal. While the limited partners could not be required to increase their contributions to the partnership, nothing in the agreement prevents them from voluntarily increasing their contributions. Thus, the fact that the principals agreed to additional capital contributions for construction and operation of the proposed station, beyond

those required by the limited partnership agreement, does not warrant a finding that the partners cannot be relied on to fulfill their partnership obligations. Because of the need for additional funds, the fact that the partners might have entered into an additional agreement without specifically putting that agreement in writing is not probative of whether Anchor's partners can be relied on to adhere to the terms of the limited partnership agreement.

16. *The Comparative Evaluation:* Galaxy and Anchor are comparatively superior to the other applicants because of their integration proposals. Bechtel does not claim integration credit and SBC has not shown that its principal can be relied on to fulfill her integration commitment. Galaxy and Anchor are each credited with 100 percent integration. Anchor's proposal is preferred because the enhancement for its minority ownership and future residence outweigh the very slight credit awarded Galaxy for local residence and civic activities[8] and for its coverage proposal.[9]

17. ACCORDINGLY IT IS ORDERED, That the Application for Review filed May 30, 1990 by Anchor Broadcasting Limited Partnership IS GRANTED.

18. IT IS FURTHER ORDERED, That the Applications for Review filed May 30, 1990 by Selbyville Broadcasting Company and Susan M. Bechtel, the Contingent Application for Review filed May 31, 1990 by Galaxy Communications, Inc., and the Request for leave to file briefs, filed May 30, 1990 Susan M. Bechtel ARE DENIED.

19. IT IS FURTHER ORDERED, That the Review Board's Decision, 5 FCC Rcd 3432, IS MODIFIED as reflected herein; that the Applications filed by Selbyville Broadcasting Co., Inc. (File No. BPH-860918MB). Galaxy Communications, Inc. (File No. BPH-860918NY) and Susan M. Bechtel (File No. BPH-860918OV) ARE DENIED; and that the Application (File No. BPH-860917MD) filed by Anchor Broadcasting Limited Partnership IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

1. Bechtel requests leave to file a brief pursuant to 47 C.F.R. § 1.115(f). Bechtel has not presented a basis for review and is not entitled to further briefing.

2. Oppositions were filed June 21, 1990 by Anchor, SBC and Galaxy.

3. In denying SBC's Application for Review, we need not reach, and thus we are not relying on, the Board's findings with respect to Ms. Capobianchi's family obligations and child care arrangements.

4. While Bechtel will serve about 7115 (21.33%) more people than Anchor, the entire area is well served by other broadcast media and we agree with the ALJ that Bechtel is entitled to only a very slight preference for her superior coverage. That preference is insufficient to overcome Anchor's preference for integration. 4 FCC Rcd at 5690-91 ¶ 39; 5692 ¶ 47; *Susan S. Mulkey,* 4 FCC Rcd at 5520, 5521 ¶ 9 (1989); *Resort Broadcasting Co., Inc.,* 41 FCC 2d 640, 647 (Rev. Bd. 1973). Bechtel's remaining argument that the Commission's policy of awarding a preference for integration has been discredited and should not be applied to this proceeding is rejected. The record establishes that Anchor's principal is committed to fulfilling his integration commitment. Thus, Bechtel has not made a sufficient showing to establish that we should disregard the established comparative criteria in this proceeding. In any event, such a change in the comparative criteria would more appropriately be a rule making proceeding.

5. *United Broadcasting Company (WOOK),* 100 FCC 2d 1574 (1985). The Board further noted that Anchor's principals withdrew their application in *WOOK,* in consideration of a payment of $1,275,000 and filed the instant application four months later. 5 FCC Rcd at 2433 ¶ 6. They withdrew their application in *WOOK,* however, only after an adverse decision by the Commission and the filing of an appeal. *United Broadcasting Company,* FCC 861-59, released May 7, 1986.

6. Recently in *Royce International Broadcasting*, 5 FCC Rcd (1990), we articulated stricter and more comprehensive standards for the crediting of integration proposals. In this case, while the board refused to credit Anchor's integration proposal, based on our review of the record we find that Anchor's principals were credible and that they explained how they would comply with the policy requiring insulation of limited partnership interests. This determination is consistent with the *Royce* decision and should not be construed as either weakening or lessening our adherence to those standards.

7. Although the Board seized upon Stamps' statement that he would have to make a diary of how much time he spends in Ladysmith, that statement was made in the context of testimony that he currently considers his yacht in Baltimore to be a residence, and that he has maintained residences in Cape Code and Washington, and an admission that he does not know how much time he spends in Ladysmith. Tr. 72-73. Stamps has never retracted his pledge to move to Selbyville, and there is no basis in the record to conclude that his reference to keeping a diary of his time was intended to support a claim of a Virginia domicile *after* Anchor is granted a license.

8. Galaxy's principal did not move to Selbyville until October, 1987 and his only civic activity of record is membership in the Lion's Club starting in 1988. Thus, Galaxy can only be awarded slight credit for its principal's relatively recent move to Selbyville and his minimal civic activities.

9. Galaxy will serve about 6,400 more people than Anchor, but the populations to be served receive service from numerous other broadcast services. *See* n.3. *supra*.

[5 FCC Rcd 2432]

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
SELBYVILLE BROADCASTING CO., INC.	File No. BPH-860918MB
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for
a new FM Station on Channel 250A
(97.9 MHz) in Selbyville, Delaware

Appearances

Lewis I. Cohen and *Roy W. Boyce,* on behalf of Anchor Broadcasting Limited Partnership; *Dennis J. Kelly,* on behalf of Selbyville Broadcasting Co., Inc.; *Barry D. Wood* and *Ronald D. Maines,* on behalf of Galaxy Communications, Inc.; and *Gene A. Bechtel,* on behalf of Susan M. Bechtel.

DECISION

Adopted: March 16, 1990; Released: April 10, 1990

By the Review Board: BLUMENTHAL and ESBENSEN; Board Chairman MARINO dissenting; Board Member ESBENSEN issuing separate statement.

Board Member BLUMENTHAL:

1. This proceeding involves the applications of Anchor Broadcasting Limited Partnership (Anchor); Selbyville Broadcasting Co., Inc. (SBC); Galaxy Communications, Inc. (Galaxy); and Susan M. Bechtel for authority to construct a new FM station in Selbyville, Delaware.[1] The case was heard on a new standard comparative issue, after which Administrative Law Judge Joseph Chachkin (ALJ) ruled that Anchor was the comparatively superior applicant, *Initial Decision (I.D.)*, 4 FCC Rcd 5687 (1989). The proceeding is now before the Review Board on exceptions. We have reviewed the *I.D.* in light of the pleadings, the record below, and the oral argument held on January 5, 1990.[2] While we largely adopt the ALJ's findings of fact, we reverse his ultimate conclusion and award the construction permit to Galaxy.

2. The *I.D.* selected Anchor as the superior comparative applicant. In so doing, the ALJ had determined that only Anchor and Galaxy, neither with any attributable mass media interests, were also entitled to 100% credit for proposing full-time integration of ownership with management control, another pivotal criterion under our *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). As between those two frontrunners, the ALJ ultimately concluded that:

> Anchor and Galaxy have established their entitlement to 100% integration credit. Also, Anchor and Galaxy suffer no diversification demerit. However, Anchor prevails on qualitative enhancement. Anchor's substantial credit for 100% minority involvement, future local residence, and auxiliary power credit outweighs Galaxy's very slight credit for recent local residence, recent and de minimis civic activity, auxiliary power credit, and very slight comparative coverage advantage.

I.D. at para. 47 (footnote omitted).

3. SBC, whose own ownership "integration" proposal was rejected by the ALJ, *see id.*, paras. 43-44, here seeks: (1) rehabilitation of its rejected "integration" proposal; (2) rejection of Anchor's "integration" proposal (as well as financial and misrepresentation issues against Anchor), and (3) rejection of the "integration" credit awarded to Galaxy. Somewhat similarly, Galaxy also seeks rejection of Anchor's "integration" proposal (as well as financial and false certification issues against Anchor). And, finally, while broadly challenging the efficacy of the "integration" proposals of all of its three competitors, Bechtel confines its formal exceptions to a frontal challenge to the *Policy Statement*'s basic "integration" criterion, and it claims that its own proposal (which candidly seeks no ownership "integration" credit) will better serve the public interest nonetheless.[3]

4. After reviewing the *I.D.*, the underlying record, and the pleadings before us, we hereinbelow grant, in part, the exceptions of SBC and Galaxy as to Anchor, deny *in toto* the exceptions of Bechtel, deny the exceptions of SBC as to its own application, and find that Galaxy should prevail under the standard of comparative tenets of the *Policy Statement*. Our reasons now follow.

EXCEPTIONS

I. ANCHOR

5. Whereas the *I.D.* awarded Anchor a 100% quantitative full-time "integration" credit for the management proposal of one of Anchor's four 25% equity principals, and its sole "general" partner, Dr. Herman Stamps,[4] SBC and Galaxy urge that the evidence does not support Anchor's claim that its "general" partner will remain wholly insulated from its "limited" partners in the management of the partner. Both exceptors point to circumstantial and testimonial evidence for the proposition that, although Anchor's limited partnership agreement may contain the boilerplate insulation provisions mandated by the Commission's *Ownership Attribution* policies, *see supra* note 4, it is exceedingly unlikely that Stamps, a

retired dentist and Howard University Dental School faculty member, will relocate to Selbyville (population 1,250) and unitarily manage the proposed Anchor station. In support of their contentions, the exceptors advert to the past relationships between Stamps and his three "limited" partners, to Stamps' hearing testimony as to the likely nature of their future relationships, and to Stamps' predicted domicile.

6. In background, both the *I.D.* (para. 6) and the exceptions reflect *that* Stamps and Anchor's three other 25% equity principals, Ridgley C. Bennett, R. Kenneth Mundy, and Francis L. Smith, were formerly constituted as a corporation d/b/a District Broadcasting Inc., which entity in 1978 filed a competing application for the frequency occupied by WOOK (FM). Washington, D.C. The Review Board affirmed the Initial Decision of a Commission ALJ awarding that contested frequency to District Broadcasting[5]; however, District Broadcasting later settled that proceeding with the incumbent licensee and it withdrew its competing application in consideration of $ 1,275,000. Some four months later these same four District Broadcasting principals filed their instant application for Selbyville, this time d/b/a Anchor.

7. The exceptors observe, and the record here confirms, that while prosecuting their Washington, D.C., application (as District Broadcasting) from 1978 to 1986, these same four Anchor principals likewise each held equity interests of 25% but none proposed management passivity as either a "limited partner of a non-voting shareholder; all were equal, active, and voting shareholders. In fact, when questioned at this hearing as to whether all four principals participated actively in the business affairs of District Broadcasting, Stamps testified in the affirmative, and he went on to explain that all four Anchor principals met frequently to discuss such matters as the ascertainment of community needs, program format, advertising demographics, the hearing exhibits submitted to the FCC by District, and all "met extensively with radio people, broadcast people to develop an attitude about what the station would be." Tr. 53. As to their roles in District, Stamps here responded (Tr. 54):

JUDGE CHACHKIN: In other words, you acted as equals, all four of you.

THE WITNESS: Oh, yes.

JUDGE CHACHKIN: You all equally participated and all equally made decisions.

THE WITNESS: Yes.

8. Not only did all four principals take as active role in District while prosecuting that FM radio application, all four would have overseen the general policy and the program format ("the general things that an owner would do") at the Washington D.C. radio station, Tr. 52,[6] and all four would have been active members of that station's "Policy and Program Board" had they acquired that FM radio license. When asked whether Mundy, Bennett, and Smith would have been actively involved with "the programming effort" of that station, Stamps replied: "Naturally, we were equal stockholders." Id. Although the four Anchor principals settled out of that case, the experience of being involved with broadcasting merely piqued their appetite for the challenges of broadcasting, so they filed quickly for Selbyville. Or, as Stamps expressed it (Tr. 55-56; emphasis added): "We were *into* broadcast. . . the broadcast thing. We *still* had the taste in our mouth."

9. With that "taste" still fresh, still fresh, the four District Broadcasting principals almost immediately filed their instant application d/b/a Anchor. Paradoxically though, claim the exceptors, not only was the Anchor application not structured to emplace three of the same four excited principals "into broadcasting," its limited-partnership structure, by law, would virtually prohibit three of those same principals (Mundy, Bennett, Smith) from any active role in broadcasting (save a possible return on investment), since passive investors are barred absolutely under *Ownership Attribution* from so much as "communicating with the licensee or the general partner on matters pertaining to the day-to-day operations of its business." 58 RR 2d at 619.

10. Above and beyond the active policy role played, and slated to be played, by all of Anchor's principals at their proposed Washington, D.C., radio station, the exceptors also focused upon the extremely close business and social relationships that yet fuse the four Anchor principals. For, in addition to the District Broadcasting and Anchor ventures, Kenneth Mundy testified that he, Stamps, Bennett, and Smith are joined in other investments together, Tr. 272-276, and that (Tr. 258):

> All four of us are what you would call the very best of social friends. Our wives are probably playing bridge right now.

And as Mundy explained, these relationships (of several decades duration) transcend the merely social (Tr. 260):

> Yes, socially, but you see, I have to add, I've been Dr. Stamps' lawyer too. When you said business, that's why I--he's my wife's, he's our family's he was our family's dentist, and I was his lawyer, so we've talked about things that would come under the panoply of that. Oh, I've talked to him about his job at Howard, So. Mr. Woods, I've been the lawyer for all three of them, at one time or--of my partners, at one time or another.

See also Tr. 261-262.

11. Because Stamps here testified that all four Anchor principals had "naturally" intended to be relatively active in the Washington, D.C., station affairs, since they were all (as here) "equal" owners, and in light of the exceedingly close social and business relationships still maintained amongst the four principals, Stamps was quite "naturally" questioned about the proposed passivity of three of the four Anchor principals, whose taste for broadcast involvement had only been intensified by their immediately prior experience. Thus, Galaxy counsel propounded to Stamps as follows (Tr. 151: emphases added):

Q. Well, what is your expectation about how the actual relationship among the partners is going to work?

A. *Well, I am afraid to answer that question because I know what is expected of me by law.* Now, when you say talk about, well, you know, like somebody might yell down the street something, and that might constitute talking about it. So I don't know how to answer that question according to the law.

I mean there's a real world and then there's this.

Right here I am going by this.

Q. But in the real world you expect that you probably will have-

A. *I would not admit that any darn way.*

Q. *Excuse me?*

A. *I would never answer you on that one, sir.*

MR. WOOD: I direct the witness to answer, Your Honor?

12. Anchor counsel briskly intervened at that point, and after brief colloquy the examination of Stamps continued (Tr. 153; emphasis added).

Q. But, realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station if you are having problems with a particular employee , or you wanted to change the format or anything like that, that you are going to end up talking to these partners about those things, if you happen to meet them in a social--

> A. *I don't know which amendment there is about possible self-incrimination, but I certainly wouldn't answer "yes." I would stick to what this says.* I always have control of the second side of communication.

13. The exceptors site not only to Stamps' stated reluctance to answer, under oath, questions concerning the likely working relationship amongst Anchor's principals, and his purposeful distinction between its paper agreement and the "real world." They note, as well, that Mundy (an attorney) testified that he was unaware of any Anchor contract clause that specifically precluded him from discussing ordinary station business with Stamps. The questioning of Mundy went as follows (Tr. 264):

> Q. Are you aware of any prohibition on your discussing the business of the station with Dr. Stamps?
>
> A. I'm aware of the fact that Dr. Stamps, as general partner, is the person who will run and be the sole authority for running the station. Uh, and I would accept it at that.
>
> Q. But you're not aware of any explicit provision that says you can't talk to him about the business of the station?

Before Mundy could answer, Anchor counsel again objected (Tr. 265); and after the objection was overruled, Mundy stated (Tr. 266);

> THE WITNESS: I'm not aware of anything in writing that says I can't talk to him about it.

After further consultation between the ALJ and counsel, Mundy was provided with a copy of the Anchor partnership agreement, shown the specific clause requiring his total

insulation from day-to-day station affairs, and the questioning of Mundy resumed (Tr. 269):

> Q. So, is today the first time that you were really aware of the precise prohibition that's set forth in subparagraph B as to your communicating with the general partner about the day-to-day operations?
>
> A. Yes, sir. In that language, yes, sir.
>
> Q. All right. So, I take it it wasn't specifically discussed at any of the organizational meetings that took place relating to the formation of Anchor?
>
> A. It may have been and my memory is just lax. It may very well have been.
>
> Q. But you don't remember any such discussions focusing on this problem?
>
> A. I--I can't highlight it in my mind now a particular discussion on that.

Although all of the Anchor principals elsewhere indicated an awareness of the agreement's insulation element, and pledged generally to abide by the written agreement, the exceptors assert that the testimony of Stamps and Mundy evince very little intent or expectation to hew strictly to the technical terms of the Anchor agreement, at least in the "real world."

14. The exceptors next challenge directly Dr. Stamps' pledge to relocate to Selbyville, so as to manage Anchor's proposed station on a full-time basis. In support of this challenge, they observe that Stamps currently maintains his home in Washington, D.C., where Stamps testified that his "business interest is still centered." Tr. 73. However, Stamps has been "gradually" transferring his affairs to his other home in Ladysmith, Virginia, a town approximately 60 miles south of

Washington, D.C., which Stamps describes as "[m]y principal residence for tax purposes." Tr. 72. To avail himself of Virginia's 5.75% marginal tax rate on personal income (State of Virginia Tax Rate Schedule (official notice taken)), "in contrast to substantially higher rates in Maryland and the District of Columbia,"[7] Stamps testified that he must be in residence there for at least six months-and-a-day each year. Tr. 74. Although, at hearing, Stamps testified that he could not allocate the time he presently spends in Ladysmith, "I guess at some time I *will have to start* making a diary on it." Tr. 72-73 (emphasis added). In addition to his homes in Ladysmith and Washington, D.C., Stamps has a home in Cape Cod, Massachusetts, and a yacht anchored in Baltimore, Maryland, on which vessel he also occasionally resides.

15. Stamps indicated no plans to sell (or rent) his Ladysmith "domicile," his Cape Cod home, or his Washington, D.C., residence. In an attempt to set the record straight as to Stamps' proposed future residence, the ALJ himself interjected (Tr. 71-72; emphasis added):

> JUDGE CHACHKIN: Well, let's put it more bluntly. Will you maintain a residence somewhere else besides the Selbyville area?
>
> THE WITNESS: I don't know. I have several residences now, and what--whether I would confine my living--*I don't see commuting, going up and down the road every weekend*, so that I have a place in Virginia, a place in D.C. I have a place in Maryland, and I have a place in Delaware. *I think that I would probably be pretty much in the capital area. I think other areas would be visitations. That cannot be predicted.*

Inasmuch as Stamps evinced utterly no intention to forsake his Virginia "tax domicile," and in view of his testimony that he plans to locate "pretty much in [the] capital area," but not "commuting . . . up and down the road every weekend," the exceptors contend that Stamps' pledge to relocate his residence

to Selbyville cannot be credited, by dint of his own conflicting and/or equivocal testimony.

16. Galaxy, and to a lesser extent SBC, contend that Anchor's intent to abide by the strict terms of its limited partnership contract is further belied by a "side agreement" to provide construction and operational financing for the proposed station, an agreement they contend is in flat conflict with the Anchor partnership contract itself. In this, they point to Paragraph 7(c) of the Anchor contract, which provides: "In no event shall the Limited Partners be obligated to contribute more than $21,250 each as capital contributions." Further, Paragraph 13(a)(iv) of the Anchor contract provides: "No Limited Partner shall be liable for the debts of the Partnership in excess of his contributions to the capital of the Partnership." And, finally, Paragraph 23(b) thereof provides: "This Agreement represents the entire understanding between the parties and cannot be amended except in writing. . . ." (Emphasis added.)

17. Anchor's principals conceded a deposition that the $85 thousand ($21,250 x 4) called for by their limited partnership contract would not cover all of their requisite expenses; rather, the principals later claimed at hearing that the $85 thousand was intended to cover only the expenses of prosecuting the Anchor application, and that all four had a mutual oral agreement to each contribute another 25% of all costs for constructing the station and for operating the facility for the first three months (without resort to advertising revenues).[8] Although Anchor principal Bennett initially denied any extant obligation on the part of each partner to contribute in excess of $21,250,[9] Anchor eventually supplied the declarations of all four principals attesting that, prior to Anchor's financial certification, each had orally agreed to contribute equally toward construction and operating costs as well.[10] The exceptors charge that the alleged oral "side agreement" is not only patently inconsistent with Anchor's written partnership contract, and therefore a legal nullity, they also charge that the ALJ committed reversible error in refusing to add financial and misrepresentation issues against Anchor, asserting that the

existence of a "side agreement" in such evident conflict with its own contemporaneous writing is plainly incredible.

18. Initially, we do not believe that the ALJ erred in failing to add a financial (and a misrepresentation) issue against Anchor. What we believe is that the exceptors have overdrawn the same set of facts regarding the "side agreement" for Anchor's financing, and attempted to impale one peg into two quite disparate holes, *viz.*, basic financial qualifications for one, and integration of equity ownership with day-to-day management, for another. As to the first, Anchor filed at a time when all that was necessary was the applicant's self-certification that it genuinely possessed "reasonable assurance" of the resources necessary to meet the Commission's minimum financial standard. *See Revision of Form 301,* 50 RR 2d 381, 382 (1981); *see also Priscilla L. Schwier,* 4 FCC Rcd 2659 (1989), *aff'd per judgment sub nom. New Life Evangelistic Center, Inc., v. FCC,* No. 89-1256 (D.C. Cir. filed February 7, 1990).[11] Anchor has submitted the sworn declaration of each of its principals that he has always been fully committed to construction and operation costs, over and above the $21,250 "prosecution" expenses specified in their limited partnership contract. Our exceptors can merely speculate that these declarations are untrue in the face of the partnership contract's very precise limitation on equity contributions. But all four Anchor principals stoutly avow otherwise, and nothing in the FCC application form (or elsewhere) required that a financial certification be supported by a written contract, particularly where the principals are self-financing as are Anchor's.[12] The exceptors have not shown that the Anchor principals are not committed financially (as per their declarations); and they have by factual allegation raised no palpable doubts whatever that any of the principals cannot meet his respective financial obligations to cover all costs, especially in the wake of their joint $1,275,000 windfall in the WOOK-FM proceeding just prior to their certification. Where a direct challenge to a financial certification is based on not much more than speculation, no hearing issue will be added. Priscilla L. Schwier. Whatever the strict language of Anchor's limited partnership contract (or its tangential implications), and in the

absence of any factual information rebutting the apparently timely promises of Anchor's principals to supply the necessary funding, or raising questions as to their ability to satisfy those mutual pledges, we find no substantial and material questions ripe for litigation on the facts. *Compare, e.g., Opal Chadwell,* 4 FCC 2d 1215 (1989) (proceeding remanded on substantial question over applicant's personal assets).

19. As to the second aspect of the exceptors claims arising out of the strict financial contribution/liability language of the Anchor partnership contract, we do not find that any variance between the language and its principals' "side agreement" to furnish funding is nearly sufficient, by itself, to conclude that Anchor has demonstrated that it intends not to be otherwise bound by the unrelated terms of its written contact, so much so that Anchor's basic "integration" proposal must be rejected. Though we acknowledge the apparent variance, we believe it is entitled to only slight evidentiary weight as regards Anchor's "integration" proposal, for, as discussed immediately below, we conclude that additional, more persuasive evidence of record requires us not to award that pivotal credit.

20. The case law is long and unwavering that every applicant has the burden of proof under the *standard comparative* issue, and must convincingly support each component element thereof. In carrying that burden, though, the Commission will generally accept the simple pledges or promises of an applicant, and these pledges will not be discounted unless countervailing evidence raises sufficient doubt that we cannot say the applicant has met its ultimate burden. Almost routinely, however, we do find that a particular applicant has *not* overcome direct or circumstantial evidence at unlikely odds with a mere self-serving pledge as to some facet of its comparative case, including "integration." *See, e.g., Joseph Bahr,* 92 FCC 2d 114, 121 (Rev. Bd. 1982) (integration credit refused where written organizing agreement not substantially respected), *aff'd sub nom. Global Broadcasting Group, Inc.,* 54 RR 2d 404 (1983), *aff'd,* 763 F.2d 450 (D.C. Cir. 1985); *Blanceu Broadcasting Co.,* 17 FCC 2d 227, 229 (Rev. Bd. 1969) (inte-

gration credit refused where conflicting business interests not overcome); *Ft. Collins Telecasters,* 103 FCC 2d 978, 985-986 (Rev. Bd. 1986) (same), *review denied,* 2 FCC Rcd 1780 (1987), *aff'd per judgment,* 841 F 2d 428 (D.C. Cir. 1988); *Lenninger-Geddes Partnership,* 2 FCC Rcd 3199 (Rev. Bd. 1987) (same), *review denied,* 3 FCC Rcd 1811 (1988); *Doylan Forney,* 3 FCC Rcd 6330, 6334-6335 (Rev. Bd. 1988) (integration credit denied where no true management function demonstrated); *Vacationland Broadcasting Co., Inc.,* 97 FCC 2d 485, 493-494 (Rev. Bd. 1984) (same). Another applicant in *Doylan Forney* was denied "integration" credit where the pledge of personal full-time management was too impermanent. 3 FCC Rcd at 6334; *see also Signal Ministries, Inc.,* 104 FCC 2d 1481, 1497-1498 n. 16 (Rev. Bd. 1986) (same), *review denied,* 2 FCC Rcd 1259 (1987), *aff'd per judgment sub nom. Adelphi Broadcasting Corp. v. FCC,* 838 F.2d 571 (D.C. Cir. 1988).[13]

21. More recently, and in the wake of a deluge of applicants proposing a two-tiered ("active"/"passive") ownership structure, the Commission and the Board have rejected a host of extrapolated "integration" requests, where probative evidence strongly suggested that certain equity principals would not remain wholly passive, even in the face of written contracts and the stated pledges of the principals. *See, e.g., Metroplex Communications, supra* note 4, 4 FCC Rcd at 8159 (and cases cited therein). Or, as the Commission stated in *Coast TV,* 4 FCC Rcd 1786, 1787 (1989).

> [S]ometimes an applicant may present a favorable formal structure on paper in order to gain a quantitative integration preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision-making process. In those instances, the Commission disregards the applicant's formal ownership structure and treats the nominally passive

owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant-- and thus relevant to the Commission's integration analysis. *See, e.g., Signal Ministries, Inc.,* 104 FCC 2d 1481, 1494-97 ¶¶ 15-16 (Rev. Bd. 1986), *review denied* 2 FCC Rcd 1259, 1259 ¶ 2 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC,* 838 F.2d 571 (D.C. Cir. 1988); *KIST Corp.,* 102 FCC 2d 288, 292 ¶ 9 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc., v. FCC,* 801 F.2d 1436 (D.C. Cir. 1986), *cert denied,* 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co.,* 63 FCC 2d 419, 424-26 ¶¶ 10-13 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC,* 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be discredited. *Victory Media,* 3 FCC Rcd 2073, 2074 ¶ 18 (1988).

22. And "integration" credit has likewise been withheld where direct or salient circumstantial evidence leaves serious questions as to whether a particular equity principal, pledging to relocate to another community so as to personally manage the station on a full-time basis, will earnestly forsake a current residence. Again, while the Commission will conventionally accept a simple pledge to relocate, any evidence to the contrary will be weighed simultaneously, and we will not always accept the bare pledge. *See, e.g., Knoxville Broadcasting Corp.,* 103 FCC 2d 670, 686-689 (Rev. Bd. 1986) (integration credit denied despite pledge to relocate); *Berryville Broadcasting Co.,* 70 FCC 2d 1, 11-13 (Rev. Bd. 1978) (integration credit denied, in part, because of dubious pledge to relocate). Not only with respect to pledges to relocate a permanent residence, but with respect to all facets of an "integration" proposal, the *Knoxville* Board reflected:

> In practice, it lies with the applicant advancing an "integration" proposal to allay any serious questions which may bear upon likely effectuation of that proposal, despite strong circumstantial evidence raising inevasible doubts. Sometimes an applicant is successful in dispelling the serious doubts that have arisen. *See, e.g., Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 586-589 (Rev. Bd. 1982) (restoring integration credit rejected by ALJ) (majority opinion), *recon. denied*, FCC 82R-77, released December 22, 1982, aff'd, FCC 83-415, released September 21, 1983 (Comm'n), *aff'd mem. sub nom. Blake-Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir. filed April 26, 1985). Sometimes an applicant is, on the slant of the record, unpersuasive. *See, e.g., KIST Corp.*, 99 FCC 2d 173, 183 n. 22 (Rev. Bd. 1984), *modified on other grounds*, FCC 85-512, released September 24, 1985 (Comm'n), *appeal pending sub nom. United American Telecasters, Inc., v. FCC*, Nos. 85-1663, *et al.* (D.C. Cir. filed October 15, 1985). And, as suggested by the court's accompanying memorandum in *Blake-Potash, supra*, "substantial evidence" on the question of the likelihood of the effectuation of a particular applicant's "integration" proposal may support, legally, either predictive judgment.

103 FCC 2d at 687-688 (footnote omitted). Based on the entirety of the record in the case at bar, we must agree with the exceptors that the evidence taken as a whole "rais[es] inevasible doubts" as to two of Anchor's pledges, and that it has not met its burden of "dispelling the serious doubts that have arisen" through the record evidence.

23. Thus, notwithstanding the strict terms of Anchor's limited partnership contract (which, at least on financial obligations, were not taken by Anchor at face value), the record here is decidedly unpersuasive that Anchor's limited partners

intended to be barred absolutely from substantive communications about station management, or are likely to remain wholly insulated in practice. First, Anchor has not explained cogently why its principals were keenly active with respect to their just previously applied-for FM facility, were left with an unsatisfied "taste" for more, but here switched lightly to absolute passivity on such vital matters as community needs and programming.[14] Second, while (as in their prior application) Stamps is slated to be General Manager, and all three other principals would have deferred to him there. Anchor principal Mundy was unaware that its limited partnership contract contained strict language *prohibiting* any discussions as to station management. which hardly evinces a conscious *intent* to be barred from such communications. More likely it seems the intent of the attorneys drafting the contract, so as to maximize Anchor's "integration" request by mechanical extrapolation. Third, in view of the deep and long-standing relationships amongst the principals, we thoroughly understand Stamps' repeated reluctance, under oath, to testify as to how their association would actually work in the "real world," as well as his sundry and pointed caveats that he "would stick" to the strict insulation onus "[r]ight here" at hearing. We have previously regarded as evasive and rather telling the testimony of a witness who suggested that his responses were for hearing purposes. *See Mid-Ohio Communications, Inc.*, 104 FCC 2d 572. 596-597 (Rev. Bd. 1986). Stamps' stated reluctance, and his purposive qualification of his testimony, is scarcely reassuring. To say the least, the totality of the record evidence on this point does not support the likelihood of a wall of silence between Anchor's 75% equity owners and Stamps as to station policy and affairs. When Stamps was questioned as to whether his fellows were, and would have been, active at their proposed Washington, D.C., radio station, we recall his reply: "*Naturally,*" they were all equal owners; only they here seek 100% (extrapolated) "integration" credit, as compared to the 25% sought in their Washington, D.C., application. Anchor has not carried its burden of rebutting the "inevasible doubts" that they will operate at arms length; it has conversely compounded them.

24. Even were we to accept *arguendo* Anchor's claims of prospective limited partner passivity, we could not on this record credit Stamps' bare pledge to relocate his residence to Selbyville, so as to personally manage day-to-day activities at the proposed station. Too much testimonial (and circumstantial) evidence runs against that *ipse dixit*. In *Berryville Broadcasting*, for example, a pledge to relocate a personal residence was held not proven, even where that principal had already purchased a mobile home in the proposed community of license. In view of the fact that the *Berryville* principal did not commit to relinquishing his other homes, and could not describe what he meant by his "primary residence," the Board found the relocation pledge "to be so vague that it cannot be credited." 70 FCC 2d at 12.

25. Here, Stamps has several current homes, has indicated no intent to relinquish any of them, and has selected none in Selbyville. Moreover, his testimony stated, albeit cryptically, that he thought he would locate "pretty much in the capital area," and that he did not see "commuting . . . every weekend." Further, he would not even *predict* where his residences would be. Tr. 71-72. Finally, not only did Stamps disclaim to intimate that he would relinquish his "tax domicile" in Ladysmith, Virginia (where he must reside 6 months a year for residence benefits), he went so far as to state that he "will have to *start* making a diary" on his time spent in Ladysmith, Tr. 72-73, so as to document his legitimate entitlement to a Virginia residency. This seems flatly inconsistent with his pledge to relocate his prime residence to Selbyville.

26. In *Knoxville Broadcasting*, and without finding that a residency relocation pledge was intentionally disingenuous, we also denied "integration credit where an applicant's principal did not, by substantial evidence overcome ambient facts that spawned natural doubts as to the sufficiency of a bare relocation pledge. *See* 103 FCC 2d at 687-689.[15] The record here runs much more strongly against Anchor than did the evidence against the subject relocation pledges in *Berryville* and *Knoxville*. Stamps has not only failed to allay the doubts created by the circumstantial evidence, his own testimony (at

best) only heightens those doubts, and in our view undercuts his bare pledge so deeply that Anchor cannot be said to have met its evidentiary burden on Stamps' request for full-time personal "integration" credit at Selbyville.

27. We must here stress that, in agreeing with the exceptors that Anchor did not meet its burden on the personal "integration" credit it seeks, we are not directly challenging the witness credibility findings of the ALJ. Rather, by giving due weight to *all* of the testimony of Anchor's principals (conjoined with the other evidence), we simply cannot find the substantial evidence to support the comparative credit awarded by the ALJ. And the law holds that where an ALJ and a reviewing authority merely balance the same evidence, but come to opposite results on an ultimate question, no legal violence is done to an ALJ's contrary findings. *See Universal Camera Corp. v. NLRB*. 340 U.S. 474, 496 (1951): *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir.) *cert. denied*. 403 U.S. 923 (1971).[16] We do not affirm the "integration" credit awarded by the ALJ.

II. SELBYVILLE BROADCASTING

28. For reasons similar to those just discussed with respect to Anchor's quest for personal management "integration" credit, the ALJ denied credit to SBC, despite the pledge of its (purported) sole proprietor, Rita Capobianchi.[17] SBC excepts to the ALJ's refusal to honor Capobianchi's pledge, not based on the ALJ's factual findings (which SBC does not seriously dispute), but on its legal argument that nothing in the case contradicts Capobianchi's pledge.[18]

29. We will not reiterate all of the facts, set out in the *I.D.* at paras. 17-28, against which the ALJ contrasted Capobianchi's simple pledge to personally "integrate" full-time at Selbyville, but incorporate by reference those findings herein. Suffice it, then, to iterate some of the more salient facts:

Capobianchi holds 33% of the outstanding stock of DB Communications, Inc., a Bethesda, Maryland, consulting radio engineering firm, the controlling balance of which is held by her husband, Darrell Bauguess, a radio engineer. She is currently Secretary/Treasurer of DB (as well as one of its two Directors), and is its Director of Operations where she oversees "the operations of the office, entailing recruiting engineers, interviewing them, hiring, doing the financial quarterly reports for the company, sending the statements out, posting them, and overseeing, in general, the entire running of the offices." *Id.*, at para. 19 (quoting Tr. 325). Though she has said she will give up these workaday duties, leave her husband's firm, and move to Selbyville, she has not indicated that she will divest her DB stock or her officer/directorship, nor has she given any consideration to training a replacement for her at DB., *id.*, para. 20.

30. Furthermore, although Capobianchi maintains her own personal bank account, most of SBC's application expenses have been paid by DB Communications. At her deposition, she declared that she intended DB to continue to pay SBC's expenses; at hearing she denied having said so, *id.*, para. 23. While there is no loan agreement between DB and SBC (or Capobianchi), she considered the DB checks to have been in the nature of an "officer advance," but denies telling her husband about these substantial advances. She also denied that her husband later suggested not using DB funds for Selbyville, but her husband testified that he "directed" her not to do so after the date of his deposition. Sometime during the hearing, she stopped using DB funds, but could not explain why. *See id.*, paras. 24-25. DB prepared SBC's engineering exhibit, and her husband accompanied her to the bank to discuss the SBC loan. *id.*, para 22. Despite all of this, neither DB nor her husband are claimed to have any equity interest in SBC.

31. Moreover (*Id.*, at para. 28)[19]

> Bauguess and Ms. Capobianchi have three children, ages 7, 11, and 15. She has never had

more than casual discussion with her husband as to who would care for them if she moves to Selbyville (Tr. 352-353). They will not accompany her to Selbyville, and she plans to rely upon her husband (who is employed full-time at DBC) and her mother. She has not, however, discussed her plans with her mother (Tr. 371-372) She does not believe her mother (who does not reside with the family) will do more than she does now, which is to prepare dinner. She views her eldest two children as being self-sufficient (Tr. 504-505). The DBC offices are located in close proximity to the Bauguess residence and the children's schools (Tr. 522-523).

32. Finally, while Capobianchi was here pledging to personally relocate to Selbyville to full-time manage that proposed station, she simultaneously had on file with the Commission two other FM broadcast applications, one in Murells Inlet, South Carolina, and another in Charlottesville, Virginia. *Id.*, para.

27. Though the time had not come for filing formal "integration proposals in those two proceedings, Capobianchi was asked whether she planned to personally manage either of those two stations, if either of those Construction Permits were awarded to her during the pendency of this Selbyville proceeding. After indicating in the affirmative, she explained (Tr. 356.):

Q. When did you decide that you were going to be integrated in Charlottesville and in, uh, Murrells Inlet?
A. I hadn't really--when I decided?

Q. Yes?

A. I think it's all pending what happens with the outcome of this.

> Q. Yeah, well, when did you make that decision, that you would be integrated subject to the outcome of this proceeding?
>
> A. When I--when I filed the application, I thought about it then.

The ALJ sought to clarify her response (Tr. 358):

> JUDGE CHACHKIN: This application may go on for two or three years. The question is what are you going to do with Charlottesville in the meanwhile?
>
> THE WITNESS: Well, if Charlottesville comes up for hearing, uh, and I'm still in this proceeding, then I will dismiss it.
>
> MR. COHEN: When did you come to that conclusion that you just expressed to the Judge?
>
> THE WITNESS: Right now, I'm in a hearing.

After being shown her deposition in which she had indicated an intent to pursue her Charlottesville proposal, the ALJ pressed the witness further (Tr. 370-371; emphasis added):

> JUDGE CHACHKIN: Well, let's turn it around, supposing the Charlottesville application is granted before the Selbyville, Delaware, application, then what would you do?
>
> THE WITNESS: Is granted?
>
> BY JUDGE CHACHKIN:
>
> Q. Yes?

A. You're talking about the construction permit?

Q. Yes?

A. Before Selbyville, well --

Q. Yes?

A. *Then I'd probably have to go with Charlottesville.*

Q. *And is that also true about Murrells Inlet, if that application is granted before Selbyville, you would go with that one, before Charlottesville and, uh --*

A. *Yes.*

Q. All right.

33. We will squarely affirm the ALJ's refusal to grant personal "integration" credit to SBC, based upon Capobianchi's bare (and conditional) pledge. Not only has Capobianchi failed to demonstrate how she will extricate herself from her deep involvement in the affairs of DB Communications, *see Blancett Broadcasting, supra; Ft. Collins Telecasters, supra,*[20] or persuasively supported her claim to move to Selbyville; *see Knoxville Broadcasting, supra; Berryville Broadcasting, supra;* the financial and operational relationships between Capobianchi, DB, and its principal owner, Darrell Bauguess (her husband), in connection with this application are so intertwined that, at a minimum, we could not proceed further with its application prior to further hearing on a real-party-in-interest issue against SBC. *See Richard P. Bouff,* 4 FCC Rcd 4924, 4928-4930 (Rev. Bd. 1989); *see also N. E. O. Broadcasting Co.,* 103 FCC 2d 1031 (Rev. Bd. 1986) (wife claims sole ownership so as to extract 100% "integration" credit, plus full gender enhancement). In fact, the entire scenario sketched loosely by Capobianchi and Bauguess is so "illogical and highly suspicious," *WHW Enterprises, Inc., v. FCC,* 753 F.2d 1132, 1141 (D.C.

Cir. 1985), that we would also add a lack of candor issue at that further hearing. From her allegedly "Covert" use of DB Communications' funds, to her airily contemplated suggestion of leaving her critical management duties at DB, to her claim that she will also leave her home and three tender children in the care of her husband (also, then, saddled unitarily with the operation of DB Communications) and her mother (with whom she has not discussed the matter) to move to Selbyville (or South Carolina of Virginia, whichever first), this blithe "integration" proposal "is at best highly implausible and at worst utterly ridiculous." *Id.*[21]

34. And even if we overlooked all of the foregoing, her pledge here to move to Selbyville appears clearly to have been contingent on any prior success with her concurrent Murrells Inlet and/or Charlottesville applications, but we do not accept conditional "integration" pledges where the occurrence of the operative condition cannot be foretold at the time the pledge is made. For this reason alone (as if more were needed), we find Capobianchi's bald offer to move to Selbyville "too conditional and uncertain an undertaking to be credited." *Utah Television Associates, Ltd.*, 102 FCC 2d, 1470, 1480 (Rev. Bd. 1985); *of Metro Broadcasting, Inc.*, 99 FCC 2d 688, 706 (Rev. Bd. 1984) (separate statement) (subsequent history omitted).[22] The *I.D.* is ratified as to SBC.

III. GALAXY

35. Galaxy is a Delaware corporation, all of the stock of which is owned by Alexander Soroka (President/Board Chairman). On October 9, 1987, Soroka purchased a home in Selbyville, where he now spends 80% of his time. His only local civic activity is the Lion's Club, which he joined in early 1988. Nobody challenges his Selbyville residence or his 40(+) hours per week commitment to the station. However, his relatively recent move to Selbyville and his scant civic activities are entitled to only very slight weight under "past local residence." *See Bradley Hand and Triplett*, 89 FCC 2d 657, 663 (Rev. Bd. 1982).

36. Although Soroka has proposed to be the General Manager of his station, and has no recorded conflicts, SBC challenges Galaxy's full-time integration credit on the theory that his anticipated duties are insufficiently specific to be regarded as "managerial." Thus, Soroka indicated that he will supervise his sales and programming employees; but, asserts SBC, he will not personally sell commercial air time, be an announcer, news director or reporter, serve as bookkeeper, or do any engineering. Nor will he choose the music personally.

37. The 1965 *Policy Statement* expressly recognizes the role of General Manager, 1 FCC 2d at 395, and the case law does not require that managerial owners perform employee-type functions to receive "integration" credit. Indeed, employee-type functions are given no credit whatsoever. *Id.; Doylan Forney, supra,* 3 FCC Rcd at 6335. SBC does not directly challenge Soroka's pledge to live in Selbyville, devote full-time to his wholly-owned station, to oversee his few employees, or to set vital station policies. Hence, the cases cited in its exceptions are plainly inapposite.[23] Even accepting at industrial strength the facts set out in SBC's exceptions, a demurrer would not be insufficient to reject its own nebulous objections, as did the ALJ (*see also* Tr. 549-550). We will affirm the 100% full-time integration credit awarded to Galaxy.

IV. CONCLUSION

38. With Galaxy the only applicant receiving 100% full-time ownership/management integration credit, it must prevail because a clear quantitative "integration" advantage cannot be overcome by various qualitative attributes. *West Michigan Broadcasting Co. v. FCC,* 735 F.2d 601, 605 & n. 7 (D.C. Circ. 1984); *accord. Jerome Thomas Lamprecht,* 3 FCC Rcd 2527 (1988); *cf. Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 (1987) (subsequent history omitted). With no media diversification priorities appearing here, Galaxy's clear "integration" preference is dispositive.

39. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed September 25, 1989 by Anchor Broadcasting Limited Partnership IS DENIED; and

40. IT IS FURTHER ORDERED, That the application of Galaxy Communications, Inc., (File No. BPH-860918NY) IS GRANTED, and the applications of Anchor Broadcasting Limited Partnership (File No. BPH-860917MD); Selbyville Broadcasting Co., Inc. (File No. BPH-860918MB); and Susan M. Bechtel (File No. BPH-860918OV) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

1. It appears that eleven (11) applicants were originally designated for consolidated comparative hearing. *Hearing Designation Order,* 2 FCC Rcd 7051 (1987), but only the four (4) captioned applicants remain.

2. After hearing oral argument, the Board urged the parties to continue their discussions toward an amicable settlement and to report back any progress. We were later advised by counsel that no settlement could be reached.

3. In support of its unorthodox exceptions, Bechtel, on November 15, 1989, filed a lengthy supplement to its exceptions purporting to demonstrate that the Commission's ownership "integration" criterion, as more recently applied, has been inadequate to promote long-range ownership on the part of Construction Permit recipients. We will strike this unauthorized pleading, which is not permitted under Commission rule, *see* 47 CFR ¶ 1.277, and its attendant motion for leave. Not only is Bechtel's pleading unauthorized, insofar it merely augments Bechtel's exception theory that the Commission's "integration" policy is "bankrupt," and should be ignored (at least in this case), it must be deemed irrelevant here, since the Board has no authority to afford the relief it seeks.

4. By operation of the Commission's *Ownership Attribution* policies, 97 FCC 2d 997 (1984), *on reconsideration,* 58 RR 2d 604 (1985), *clarified,* 1 FCC Rcd 802 (1986), as extended to ownership "integration" calculations in com-

parative licensing proceedings, the "passive" ownership interests of *bona fide* "limited" partners are not factored at all into the "integration" analysis. Or, put another way, the equity interests of only the "active" principals (e.g., "general" partners) are extrapolated to the applicant as a whole, as if these "active" principals were the exclusive equity owners. For a more elaborate discussion of these dynamics, *See Metroplex Communications, Inc.*, 4 FCC Rcd 8140, 8150 (Rev. Bd. 1989).

5. *United Broadcasting Company, Inc.*, 94 FCC 2d 938 (Rev. Bd. 1983), *modified*, 57 RR 2d 885 (1985) (incumbent granted renewal).

6. However, in their District Broadcasting application, all four Anchor principals did not propose to "integrate" full-time into station management. They, as here, only Dr. Stamps pledged to devote full-time to station management, but they there sought only 25% "integration" credit, whereas they here seek 100% for Stamps' solo "integration" proposal, based upon Anchor's limited partnership structure rather than District's corporate form.

7. Galaxy Exceptions at 14. The comparable rate for Delaware is 7.7% on incomes above $40 thousand (official notice taken), a 25% differential.

8. The ability to prosecute, construct, and operate for three months is the current FCC financial Standard. *See Metroplex Communications, Inc.*, 4 FCC Rcd 8140, 8150 (Rev. Bd. 1989).

9. Galaxy Exceptions at 33 (citing Bennett Deposition at 18).

10. *See id.34-35 (quoting Declarations). The Anchor principals also claim to have exchanged personal financial statements prior to their financial certification to the FCC, to ensure that each was adequately endowed to meet both his oral and written commitments to Anchor.*

11. The Commission has recently abandoned its financial certification process in favor of its prior regime calling for advance documentation. *Revision of Application for Construction Permit*, 4 FCC Rcd 3853 (198(), but all applicants here filed under the 1981 regime calling only for self-certification of economic resources sufficient to meet our minimum financial standard.

12. In fact, the Commission has also recently held that the applicants filing under the 1981 certification regime need not have prepared contemporaneous documentation, but may document their finances at a later date if called upon to do so. *Northampton Media Associates*, 4 FCC Rcd 5517 (198(. In providing "reasonable assurance" of financing, "an oral contract to lend money would suffice," *id.*, at 5519, assuming that the lender's own ability is not suspect.

13. Because we find that Anchor has not persuasively supported its "integration" proposal for other more obvious reasons, we do not base our adverse determination on the exceptors' claims that Stamps' personal management commitment is impermanent, within the purport of *Doylan Forney* or *Signal Ministries*. Like much of Stamps' testmony, his passing comment (at Tr. 133) that the "foreseeable future" represents only two or three years is too ambiguous to decipher.

14. At one point in the testimony, Anchor principal Mundy suggested that a ceiling on liability was part of the basis for choosing a limited partnership form for Anchor, in contrast to the corporate form the principals had utilized as District Broadcasting. After testifying that the limited partnership format was utilized on advice of communications counsel, Tr. 270. Mundy suggested that limitations on financial liability might have played a part, Tr. 273, but he acknowledge that, as a mere corporate shareholder in District Broadcasting, his liability would have been rather similarly limited, Tr. 273-274. And we note that all Anchor principals were voting shareholders in District; none was non-voting so as to signal passivity. *See Evening Star, Broadcasting Co.*, 68 FCC 2d 129, 133-136, *recon. denied*, 68 FCC 2d 158 (1978).

15. It is true that in *Knoxville Broadcasting* the Board was affirming an ALJ's determination not to honor a residence relocation pledge, whereas we are here responding to exceptionsto the honoring of such a pledge. Nonetheless, the standard enunciated in *Knoxville* (103 FCC 2d at 688), as applied neutrally here, compels the same ultimate result, to wit;

> [T]he eventual question we must ponder is whether, by "substantial evidence" on this record, Mrs. Walker has shown herself as likely to effectuate--in full--her ambitious "integration" proposal in a manner that clearly warrants the important comparative credit that comes with personal management involvement. We regret to say that the surrounding facts and circumstances here give us insufficient confidence in the probability of the unqualified effectuation of Mrs. Walker's "integration" bid.

16. Somewhat on this same general point of law, the majority in *Penasquitos Village, Inc., v. NLRB*, 565 F.2d 1074 (9th Cir. 1977) viewed inferences derived from witness observation by an ALJ as "testimonial inferences," and inferences drawn from the record as a whole as "derivative inferences." Assuming that dichotomy, our determination on Anchor's "integration" credit proceeds from the latter genre of inference, and not necessarily the former.

17. Actually, SBC is depicted as a Maryland corporation with one class of voting stock, all owned by Ms. Capobianchi. *I.D.*, para. 17.

18. *See* Exceptions at 5-14.

19. The questioning of Capobianchi on this aspect of her relocation pledge went as follows (Tr. 371-372).

> Q. Now, you stated that you had three children, and I want to ask you in the event that your children are ill and you are in Selbyville, uh, carrying out your duties as general manager, uh, your testimony is, strike that, let me--let me back up.
>
> Am I correct that you do not intend to, uh, to bring your children with you to Selbyville?
>
> A. That's correct.
>
> Q. Your children will remain in Bethesda?
>
> A. That's correct.
>
> Q. Now, in the event that your children are ill, and you're in Selbyville, have you and your husband talked about how they will be provided for or taken care of?
>
> A. No.
>
> Q. And it's true, isn't it, that your Mother takes care of them now when they are sick?
>
> A. That's correct.
>
> Q. And does your Mother--would your Mother be the one who would take care of them if they were ill and you were in Selbyville?
>
> A. She or Darrel.
>
> Q. And Darrel is your husband?
>
> A. Yes.
>
> Q. And he works full-time, I take it, in carrying out his responsibilities in DB Communications, is that correct?
>
> A. Yes.
>
> Q. Okay, does your Mother know you propose to be integrated full-time in Selbyville?

A. No.

Q. Does she know you're planning to move to Selbyville?

A. No.

Q. Does she know that you're planning to leave your children at a home in Bethesda and move off to Selbyville?

A. No.

20. In both *Blancett and Fort Collins*, the Board held that applicants with significant business conflicts at the time of a personal "integration proposal must show a *specific* plan for eliminating that conflict. Here, Capobianchi has demonstrated nothing palpable with respect to her DB ownership or her present duties, *I.D.*, para. 21, and has not therefore met the test for ignoring her current business interests. *See also Washington's Christian Television Outreach*, 99 FCC 2d 395, 416-419 (Rev. Bd. 1984) (integration pledges not honored; professional conflicts not overcome), *modified on other grounds*, 59 RR 2d 785 (1985), *recon. denied*, 59 RR 2d 1679 (1986), *aff'd per judgment*, No. 85-1649 (D.C. Cir. December 17, 1987).

21. Lest it be thought that our skepticism over Capobianchi's pledge to leave her family for entire work weeks is based on her gender, we observe that the same skepticism is evidenced under remarkedly similar circumstances in *Berryville* with respect to a husband's proposal. See 70 FCC 2d at 9-12.

22. It is true that no formal "integration" pledges had been made in Murrells Inlet or Charlottesville at the time Capobianchi testified in this hearing. However, her testimony makes clear that she intended to "integrate" into whichever station came first, and the ALJ was correct (Tr. 358) that neither we nor Capobianchi could predict which (if any) of her three FM applications might be granted sooner. We will not speculate. (Nor does it matter that she has since dismissed her two non-Selbyville applications. This *post-hoc* fortuity cannot be used to bootstrap or upgrade her status obtaining during this Selbyville hearing).

23. SBC Exceptions at 21.

DISSENTING STATEMENT OF BOARD CHAIRMAN MARINO

The record reveals that the experienced Administrative Law Judge in this case maintained a firm but a fair control of the hearing, and then correctly concluded that the preponderance of substantial evidence establishes the *bona fides* of Anchor's application. The snippets of record, cited by opposing counsel and relied on by the majority to discredit Anchor's application, fail to reflect the thrust of the testimony, its overall context, and omit considerable evidence that fully support the ALJ's judgement. In past cases, the Board has declined "to follow the lead of skillful advocates for the competitors" and "assume that witnesses are lying in their written exhibits and oral testimony absent stronger proof than has been marshalled by the competitors in this case." *Central Texas Broadcasting Co.,* 90 FCC 2d 583, 596 (Rev. Bd. 1982), subsequent history omitted. "Absent extrinsic evidence to the contrary," the Commission has reminded us that an ALJ's judgment about specific testimony "is entitled to great weight." *Broadcast Associates of Colorado,* 104 FCC 2d 16, 19 (1986).

Here, extrinsic evidence does not undermine the findings; on the contrary, the totality of the record reports the Initial Decision. To begin, with regard to Stamps' so-called "real world" testimony, cited at Decision, paras. 11-12, it must be noted, first, that immediately prior to giving that testimony, Dr. Stamps unequivocally explained his understanding of the partnership agreement as follows (Tr. 150-151):

> Q. And you would still expect to be able to talk with them [the other partners] about the business of the station?
>
> A. In the language of the agreement, I understand I am not supposed to accept their consultation or seek it, or anything else that concern day-to-day matters of the station. I can only answer in the context of that I have sworn to.

Then, after the "real world" comment was elicited, the ALJ interjected and expressly admonished counsel to avoid the kind of general question that had led to comment and to ask Dr. Stamps specific questions as his understanding of the partnership restrictions (151-152). Thereupon, the following exchange ensured(152-153).

> Q. If you were to meet with Dr. Smith for instance in a party in his home I believe Portal Road, and there were other individuals that are present who wanted to know about the station in Selbyville, would this provision bar Dr. Smith from talking to these other people in your presence about what was going on with the station in Selbyville?
>
> A. This provision does not bar Dr. Smith from talking to anybody else.
>
> Q. Well, what about when you are present?
>
> A. In my presence? I can't stop him from talking to somebody else. I don't read that in here.
>
> Q. Well, you can't stop him from talking to you either about the station affairs, right?
>
> A. That's true. Stop. But "communicate" would imply an exchange.
>
> Q. But you do intend to talk to him about the business of the station, don't you?
>
> A. Not according to this, no. This says nor shall any communication between the general partner or the partnership on matters of day-to-day operations.
>
> Now, you can talk about the outside of the business but not the day-to-day operations of

> this or any other media enterprise. I think I understand the restrictions.

When asked how "realistic" the partnership restrictions were, Dr. Stamps explained (Tr. 154-155):

> Q. Do you view this restriction set forth here as to the ability of the limited partners to communicate with you on matter pertaining to the day-to-day operation as an unrealistic constraint that's been imposed upon the partnership by FCC regulations?
>
> A. Well, when I signed the bottom of this document I signed myself to live under this provision. I don't see a restriction here as awkward as it may apparently be any different from SEC's regulations dealing with inside trading or anything else. A lot of these things must be controlled by laws I have to subscribe to. This is what I want. I can live with them.

Plainly, the thrust of Dr. Stamps' above-quoted testimony is that he intends to observe the partnership agreement, even in "real world" situations.

Similarly, as to Mr. Mundy's understanding of the partnership restrictions, the majority opinion does not reflect that immediately after his response quoted from Tr. 266 at Decision, para. 13, the ALJ once again found it necessary to object to the questioning of counsel as too vague to help develop the record, and directed counsel to be more specific. Thereupon, Mr. Mundy gave the following specific answer even before being shown the partnership provision itself (Tr. 266).

> Q. Are you aware of any prohibition that any document, on your talking to Dr. Stamps about the day-to-day operation of the radio station?

> A. Yes. I can't give him advice, and I'm not going to participate in any of the day-to-day decisions or activity I'm aware of that.

And, after being shown the specific partnership language, Mr. Mundy elaborated (Tr. 269-270)

> JUDGE CHACHKIN: Do you recall any discussions with [Counsel] concerning what the meaning of this provision is?
>
> THE WITNESS: [Counsel] discussed the entire agreement with us. Either he or [his partner]; I've forgot which one, discussed the entire provision with us. And it was my understanding that, from the discussion, that we would not participate in, be involved in, or have any direction, or have any advice to give the general partner concerning the day-to-day operations of the station, and that the general partner was the sole authority for operating and running the station.

This testimony shows that the witness was aware of and understood the partnership arrangement, including the specific restriction on the activities of the limited partners. The record also establishes that the other two Anchor principals, Dr. Bennett and Dr. Smith, are aware of and accept the partnership restrictions too. (Tr. 298-299, 314-315). Applicants are not required to memorize partnership agreements, but only to know and abide by them.

As to Dr. Stamps' pledge to relocate to Selbyville, his testimony given immediately prior to that cited in the Decision, at paras. 14-15, makes clear that he was referring there to his plans for use of his other residences *on the weekends* and that he fully intended to reside in Selbyville Monday through Friday in order to work at the station. (Tr. 71)

> Q. Now, I notice in your Exhibit 2 concerning your integration proposal that you state you will reside in Selbyville or within the proposed city grade contour, Monday through Friday. I take it that you expect to be out on your boat on the weekends? Where do you intend to be on your weekends if not on your boat?
>
> A. That question, since there is no objection to it, I have less and less feelings about the boat, number one. I mean I don't see a relevance, but it is not for me to say. That boat and that water do not mate very well, and even though I have investigated it, I have decided totally against this boat and that water.
>
> Number two, it is presumptive as to where I would be on Saturday and Sunday. I might be totally in residence in the Selbyville area. I don't know.

In this connection, it is also a plain misreading of the record to state (Decision, para. 25) that Dr. Stamps "has indicated no intent to relinquish any" of his residences. In fact, the record speaks clearly to the contrary (Tr. 74-75):

> Q. What about the yacht in Baltimore? How much time do you spend on that yacht?
>
> A. Practically zero.
>
> Q. You don't spend any time on the yacht either in Baltimore Harbor or out on the Bay?
>
> A. Not in the last year, no.
>
> Q. What about the residence on Cape Cod? What does that consist of?

A. That is waterfront lot. My son lives there full-time. It has a house and one--a house and a cabin. Well, it was a house and a cabin connected. Cabin was recently destroyed by fire.

Q. How much time total have you spent there in the last year?

A. In the investigation of the fire, I guess I spent above five, six days in negotiation with architects and builders. Before that, I may have been there three or four days around Christmas.

Q. And that's all in the last year?

A. Just about. There may have been a few other emergency trips. My declining interest in these two places associate with the death of two wives. And my flavor of going back to either of these places has been lessened.

My wife for 36 years and I built the house on the Cape. She passed. I don't want to see it. My wife of two and a half years did not wake up one morning on the boat. I lost all feeling for that, too. I like my feeling for water, so I will probably get rid of this thing and get a boat more suited for the water around Selbyville, which would probably [be] a relatively small boat merely for the bays and not for the Baltimore Canyon.

Thus, a fair and complete reading of the pertinent record evidence supports the ALJ's conclusion that the Anchor principals intend to abide by their agreement and that the Anchor integration proposal should be fully credited. In reversing the *I.D.*, the majority improperly lumpsAnchor with the host of sham applicants referred to in the cases cited at Decision, para. 21. But even a cursory review of those cases makes

clear that Anchor bears no resemblance to those applicants. As the ALJ correctly held (*I.D.*, para. 41).

> The typical "sham" arrangement features a minority and/or female general partner who has a minor equity interest, minimal financial input and no prior relationship with the non-minority limited partners. Here, on the other hand, all the principals are minority members with equal equity interests, equal financial responsibilities who have known each other over a long period of time. Further, Anchor's Agreement contains the requisite provisions restricting the limited partners to a passive role. There is no evidence that the limited partners have been actively involved in the preparation and prosecution of Anchor's application or would assume an active role if the application was granted.

Indeed, no party to this proceeding even excepts to the ALJ's findings (*I.D.*, para. 10) that Dr. Stamps was the *only* partner to be active in preparation and prosecution of the Anchor application and that *none* of the limited partners had any role whatsoever in these activities. In these circumstances, it is difficult, if not impossible, to perceive *any* similarity between Anchor and the discredited applicants in cases cited by the majority such as *KIST Corp.*, 102 FCC 2d 288,292 (1985). *Compare Susan S. Mulkey*, 4 FCC Rcd 5520 (1989).

The majority also errs in accusing Anchor of not "explain[ing] cogently" (Decision, para. 23) why its principals, who in 1978 applied in a corporate form for an FM license in Washington, D.C. have now "switched" to a limited partnership for their Selbyville proposal. *See* Decision, paras. 6-9. In fact, Dr. Stamps specifically explained this decision in very clear terms (Tr. 160-161):

> JUDGE CHACHKIN: Now, could you tell me why--the reason for the change from what it

was formerly to what it is now; what are you proposing today?

THE WITNESS: Well, the answer could go in several directions. Number one, I was the--yet even at the time of this one, I was the retired person, and I was the most logical one to succeed my previous position.

Number two, during the ensuing ten years, even though we met as a group of four friends in the development of the District application, in the ensuing eight years, as I say, I have developed a competent library on broadcasting. I have visited stations. I work with station managers and what not, things not on the formal record, but for personal entitlement. And I have far outdistanced them in the knowledge of radio and broadcasting.

So that there was no question in their minds, because they had done nothing in the meantime for, as I say, self-improvement or training in this area. There was no question about that. The third thing, and the manner in which FCC compares comparative hearing, under this form we would get--with the same divisions of ownership, we would get 100 percent integration because I propose to go in full-time into this capacity.

Then I guess the fourth thing was the matter of who was going to take the weight. And there was an exchange of total authority; it was exchanged for responsibility, and so the liability. They don't want to share on an unlimited basis on the liability; then they have to give up their authority, so I run the whole ship.

Mr. Mundy, who like the other Anchor witnesses had been sequestered, later confirmed Dr. Stamps' testimony (Tr. 270-273):

> Q. And you didn't have any other reason to use a limited partnership for this station other than the fact that counsel recommended this form, correct?
>
> A. Well, there--there was discussions about this being the form that we were going to use, and there were reasons given for using this form.
>
> * * *
>
> Dr. Stamps was the only one that had--good fortune smiled upon him, permitted him to retire at this point. He had retired from the University. Drs. Bennett and Smith, they--they were still in full-time medical practices, private practice, and both were still employed as consultants with the Government.
>
> * * *
>
> So, they have full-time practices, plus, four or five hours a day to those other public services. I was--I'm a full-time practicing lawyer, and everyone knows that lawyers have to work harder than doctors, and I--
>
> * * *
>
> Dr. Stamps had the appetite and the time for it. The rest of us simply wanted to be out of the picture or on the sidelines in terms of what was going on with the business operation. We have faith in one another that we would trust the other's judgment.

> Now, I--I can give another example. Dr. Bennett and Dr. Smith and I are in another investment--in another investment that is kind of a new thing, about the same time Anchor came about. And Dr. Smith is the liaison with that--with that business. Dr. Bennett and I get reports from him once in awhile. That's about it. That's not a limited partnership, that's a corporation, I believe. And then I have other investments with both of them; I have other investments, so--with others, that I don't involve--I do not involve myself in my investments.

This testimony by both principals, which is specific, detailed, entirely plausible, and unrebutted by other evidence, was credited by the ALJ who observed the witnesses; it is, of course, entitled to "great weight." *Broadcast Associates of Colorado, supra,* 104 FCC 2d at 19. Although the majority disclaims that it is questioning the ALJ's favorable credibility findings and asserts it is weighing all of the testimony (Decision, para. 27), in fact, the majority has highlighted only those portions of the testimony keyed upon by the excepting parties to the exclusion of the considerable additional testimony set forth above. Nor has the majority given serious consideration to other pertinent evidence such as the ALJ's unchallenged findings at *I.D.,* para. 41, noted above, showing that Dr. Stamps was the only Anchor principal engaged in the active prosecution of the application.

There is nothing inherently suspect in an applicant's choice of business form, and indeed the Commission has expressly admonished that it will not "second-guess an applicant's business judgment" in selecting its structure absent extrinsic evidence (which is not present here) that its choice is not made in good faith. *Victory Media, Inc.,* 3 FCC Rcd 2073 (1988). The majority's heavy reliance on the previous broadcast application prosecuted by the Anchor principals would make more sense had the application been a sham; on the contrary, however, it was prosecuted for eight years in good

faith, and only adds credence to the *bona fides* of the individuals before us. Moreover, even in the previous application, Dr. Stamps was the only one of the four principals proposing to be integrated (Tr. 49), which is consistent with his plans to be the active manager of the Selbyville station.

In a further attack on Dr. Stamps' pledge to relocate to Selbyville, the majority attaches undue weight to Dr. Stamps' benign statement that he will start a diary of the time he spends at his Virginia residence (Decision, at para. 25) which, he explained, is his current domicile for tax purposes (Tr. 72, 74). Unfortunately, contested comparative proceedings may take years before they are completed, and there is obviously nothing inconsistent or wrong with Dr. Stamps keeping close track of his time spent in Virginia at present and until such time as his Selbyville application may be granted and his promise to move there becomes operative. Indeed, the Commission has explicitly stated with reference to integrated principals who relocate that "[i]t is unrealistic . . . to expect the status of the principals of an applicant to remain static during often lengthy proceedings." *Coast TV,* 4 FCC Rcd 1786 (1989) (Amendment accepted, without comparative penalty, which reported that integrated principal had moved away from the proposed community of license during pendency of Commission appeal). As in *Coast TV,* the important factor here is Dr. Stamps' continuing and unchanged commitment to relocate to Selbyville. Unsatisfied with its efforts to discredit Dr. Stamps' proposal on the basis of his testimony, the majority meanders outside the record to consider the relative tax rates in Virginia and Delaware (Decision at para. 14, and n. 7).

A final point concerns the suggestion that Anchor did not observe the financing obligations of its partnership agreement (Decision at paras. 19, 23). All of Anchor's partners testified that the partnership agreement committed each to a $21,250 share of the estimated *prosecution* costs, and that they had separately agreed at the time of the application that each would be obligated to contribute twenty-five percent to the costs of *construction* and *operation* of the station. (Declarations attached to Anchor Opposition to Petition to

Enlarge Issues, filed April 27, 1988; tr. 279-281). As in *Victory Media, supra,* where the Commission weighed the totality of record evidence, including the unrebutted testimony of the principals as to their intentions in structuring the applicant at the time it was organized, here the undisputed testimony establishes that the Anchor principals have always had a firm understanding as to their obligations regarding prosecution costs as well as construction and operation costs. In short, there is no evidence that they will operate at variance from the partnership agreement.

In sum, the ALJ found that Anchor was composed of four professional men of long standing, who testified truthfully and consistently, and whose previous application and present proposal were made in good faith. We have directed ALJs to ferret out applications that are not legitimate; similarly, we have commended them for engaging "in thorough, critical, but objective review of the factual record," rejecting adversarial contentions which constituted "nothing more than pandering to certain suspicions." *See Utah TV Assn., Ltd.,* 102 FCC 2d 1470, 1473-74 (Rev. Bd. 1985). The present ALJ has demonstrated his ability to separate the shams from legitimate proposals. *See, e.g., KIST, supra,* 102 FCC 2d at 290. His efforts in this case should have been met with affirmance rather than reversal.

Note* The subsequent history of *Central Texas, supra,* reveals that reconsideration was denied by the Board at 92 FCC 2d 914 (1982); review was denied by the Commission, FCC 83-415, released September 21, 1983, and the case was affirmed by the D.C. Circuit Court of Appeals *sub nom. Blake-Potash Corp. v. FCC,* No. 83-2112, April 26, 1985.

Some five years after our decision, in *Central Texas Broadcasting Co.,* 64 RR 2d 332 (1987), the station was transferred but only after the Commission found that "the station went on the air in March of 1985, that the station's license application was filed in April of 1985, and that it was subsequently approved on October 31, 1985. The station is currently operational, and the Petitioners have raised no issues regarding

its operation or service to its community of license. In his affidavit, Mann states that, *since the time Central was awarded the construction permit for KXXV, he has met his commitment to be primarily involved with the station's construction and operation. This is corroborated by the affidavit of Robert Good, station manager of KXXV, who has held that position since the summer of 1984.* The Petitioners have submitted no facts to contradict Mann's sworn statements, other than to indicate that they are self-serving. *Instead, they have relied on speculation. . . . The Petitioners have presented no statements by persons having any specific knowledge of his business activities which would demonstrate that Mann has not effectuated his integration commitment."* (*Id.*, at 335) (Emphasis added.)

Thus, contrary to the implications of the Separate Statement, the Commission has determined that both the grant of Central Texas's original application as well as the assignment of license of Station KXXV served the public interest.

SEPARATE STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN

It is somewhat ironic that the dissent cites as its premier authority *Central Texas Broadcasting Co.*, 90 FCC 2d 583 (Rev. Bd. 1982), a case in which the Board majority overturned an ALJ's refusal to award integration credit to a banker principal who refused to yield up his many banking interests, yet promised full-time integration into his proposed television station. As predicted in Board Member Blumenthal's dissent in that case (*id.*, at 589), the principal awarded the permit on the strength of his dubious permanent integration pledge, did, in fact, sell the station shortly after it was licensed, pocketing a substantial profit. *Central Texas Broadcasting*, 64 RR 2d 332 (1978) (per delegated authority).

As the dissent in that case stated, integration credit, which (as here) is more often than not dispositive, should not be blithely handed out where substantial evidence raises serious doubts about an integration pledge.

[4 FCC Rcd 5687]

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
SELBYVILLE BROADCASTING CO., INC.	File No. BPH-860918MB
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for
a New FM Station on Channel 250A
(97.9 MHz) in Selbyville, Delaware

Appearances

Lewis I. Cohen and *Roy W. Boyce,* on behalf of Anchor Broadcasting Limited Partnership; *Dennis J. Kelly,* on behalf of Selbyville Broadcasting Co., Inc.; Barry D. Wood and *Ronald D. Maines,* on behalf of Galaxy Communications, Inc.; *Gene A. Bechtel,* on behalf of Susan M. Bechtel; and *Jerry Hermele,* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: July 14, 1989; Released: July 24, 1989

PRELIMINARY STATEMENT

1. This proceeding concerns mutually exclusive applications for authority to construct and operate a new FM commercial radio station on Channel 250A at Selbyville, Delaware. Of the ten applicants designated for hearing, the following four have prosecuted their applications up to this point: Anchor Broadcasting Limited Partnership (Anchor); Selbyville Broadcasting Co., Inc. (SBC); Galaxy Communications, Inc. (Galaxy); and Susan M. Bechtel (Bechtel).

2. The *Hearing Designation Order*, 2 FCC Rcd. 7051 (1987), specified the following issues with respect to the four remaining applicants:

> (1) To determine which of the proposals would on a comparative basis, best serve the public interest.
>
> (2) To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

The *HDO*, at paragraph 15, directed that the areas and populations within the applicants' predicted 1 mV/m contours, together with the availability of other primary aural services in such areas, be considered under the standard comparative issue. No other issues have been added.

3. A prehearing conference with held in this case on January 25, 1988. Hearing sessions were conducted on May 24, 25, and 26, 1988. The record was closed on May 28, 1988 (Tr. 637). Proposed Findings of Fact and Conclusions of Law were filed September 2, 1988; replies thereto were filed September 21, 1988.

FINDINGS OF FACT

Comparative Issue

Comparative Coverage

4. The parties stipulated that all of the areas within each of their predicted 60 dBu contours currently receive at least five full-time aural commercial services, not including the services proposed by each applicant (Joint Ex. 1). The population and area comparisons of the facilities requested by the remaining four applicants in this proceeding are:

Applicant	Population Within 60 dbu	Area (sq. km) Within 60 dBu
Anchor	33.350	920
SBC	33,644	931
Galaxy	39,753	1,192
Bechtel	40,465	1,200

The Applicants

Anchor Broadcasting Limited Partnership

5. Anchor is a Delaware limited partnership with one General Partner, Herman F. Stamps, who has a 25 percent ownership interest and three limited Partners, Ridgley C. Bennett, R. Kenneth Mundy, and Francis L. Smith, who each have a 25 percent ownership interest (Anchor Ex. 1 p.1). Stamps is a retired dentist and the limited partners are two practicing physicians (Bennett, Smith) and a practicing attorney, Mundy (Anchor Ex. 2; Tr. 260-262, 271). The dental, medical and law practices are located in Washington, D.C. *Id.*

6. The four partners have been friends for many years (Tr. 150, 258, 313). Also, they each held at 25% equity interest in District Broadcasting, Inc. (District) which challenged the license renewal of WOOK-FM, Washington, D.C. (Tr. 48-49). District's application was filed in 1978 and prosecuted until 1986 when it entered into a settlement with United Broadcasting Company (Tr. 49). Stamps was the only principal

proposed to be integrated in District (Tr. 49). Stamps testified that he preferred District to be organized as a limited partnership but that Cohen and Berfield, his counsel, advised against it (Tr. 136-137). He believes he was told that that organizational form was not acceptable to the Commission (Tr. 137). Other than the District application and the pending Anchor application, the four partners have not been in a business venture together (Tr. 56).

7. Following dismissal of the District application, the four partners continued to be interested in obtaining a broadcast license (Tr. 54). Smith asked Cohen and Berfield to notify him if any new opportunities in radio came along (Tr. 283). Smith was notified of the Selbyville FM opportunity and in turn notified Stamps, Mundy and Bennett (Tr. 55, 256, 283, 316).

8. The decision to form a limited partnership was made on the advice of counsel (Tr. 136-137, 270). The limited partnership form was chosen because Bennett, Smith and Mundy were not interested in devoting time to the management of the station and only wished to be investors; the limited partners wanted limited liability; only Stamps had the time and inclination to be actively involved in the proposal; and to obtain full integration credit (Tr. 271-274, 302).

9. Section 10 of the Agreement states in pertinent part:

> "Except as expressly stated herein, all decisions of the Partnership shall be made by the General Partner, and the Limited Partners shall not participate in the management of Partnership affairs."

Section 13 of the Agreement states in pertinent part:

> "No Limited Partner shall participate in the control of the Partnership business or ave any

> power to bind the Partnership in any contract, agreement, compromise or undertaking..."

The provision further provides that the General Partner is required to obtain concurrence of the limited partners only in connection with the following actions; the dissolution and winding up of the partnership; the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the partnership assets other than in the ordinary course of its business; a change in the nature of the business; and removal of the General Partner pursuant to Section 22 of the Agreement. Section 13(b) provides:

> "No Limited Partner shall act as an employee, agent, contractor or consultant of the Partnership in connection with the Partnership's media enterprises nor shall any Limited Partner communicate with the General Partner or the Partnership on matters pertaining to the day-to-day operations of any media enterprise."

Section 22 of the Agreement permits removal of the General Partner only in the event of bankruptcy or incompetence as adjudicated by a court of competent jurisdiction. Section 23 (e) of the Agreement provides:

> "The parties desire and intend that this Partnership Agreement fulfill all requirements of the Federal Communications Commission (FCC) for non-attribution of the Limited Partner(s) for any ownership, comparative or other purpose. Accordingly, it is intended that this Agreement be construed to meet all such FCC requirements, and that said requirements shall supersede any provision herein deemed to be inconsistent therewith or which impair in any way said FCC requirements."

10. The four partners are fully aware of the provisions of the Agreement precluding participation in partnership affairs by the limited partners and all have pledged to adhere to those restrictions (Tr. 153-155, 162-163 (Stamps); Tr. 314-315 (Bennett)). Stamps and Anchor's attorney have been responsible for the preparation and prosecution of Anchor's application (Tr. 65, 69, 70). The limited partners' only involvement was to provide counsel with information about themselves required by the application for (Tr. 102).

11. Pursuant to Section 7 of the Agreement each partner (general and limited) has the same financial obligation to the partnership. The Agreement requires each partner to contribute up to $21,250 for a total of $85,000. This sum was intended to cover prosecution expenses. Each partner agreed, prior to the filing of Anchor's application, to contribute 25% of the funds necessary for construction and initial operation (Tr. 63, 91-92, 280-281, 289, 306).

12. Dr. Stamps, Anchor's sole General Partner, holds a B.S. Degree from Howard University and a D.D.S. Degree from Howard University. He holds a Post Doctoral Master of Science Degree from the University of Michigan. He is a Black male (Anchor Ex. 2, p. 1). From 1948 to 1955 and from 1966 until 1986, Dr. Stamps was a faculty member in various capacities with Howard University Dental School in Washington, D.C. More particularly, he served as the Associate Director of Clinical Dentistry from 1968 through 1969. From 1969 to 1971, he served as the director of Clinical Dentistry. In that capacity, he supervised approximately 200 persons, including professional and supporting staff. He served as the Coordinator of Facilities and Planning from 1971 until he retired in July 1986. In that position he directly supervised approximately 10 persons. As Coordinator, he was responsible for the development of management systems, monitoring safety programs and security programs. Part of his duties also involved coordinating building contracts and renovation contracts. He represented the user (the College of Dentistry) in dealing with contractors, architects, lawyers,

tradesmen or any other persons involved in a particular project. While serving as Coordinator, he was responsible for renovation of the existing dental building and the addition of two floors. He also had primary responsibility in representing the University in a major OSHA proceeding. He supervised the construction of a television studio and visual aid laboratory which was utilized to train students (Anchor Ex. 2, p. 1-2).

13. Dr. Stamps has served as the Managing Director of three medical complexes located in Washington, D.C. during the years 1964 through 1984. These medical complexes were full-service facilities which treated patients. His duties included: maintaining the communications system, coordinating financing, coordinating all purchases and utility services rendered to the complexes. He also supervised the employees involved in maintenance. He had responsibilities dealing with vendors and other business organizations which provided services to the complexes He was also responsible for liason with governmental agencies and negotiating grants and service contracts (Anchor Ex. 2, p. 2).

14. Dr. Stamps will be the full-time General Manager of Anchor's proposed station in Selbyville, Delaware. He will devote a minimum of forty (40) hours per week, Monday through Friday, and additional time if needed, to his duties as General Manager. He will oversee the ordering of the equipment and the construction of the station. He will recruit and select the staff of the station, and will be in charge of staff changes, setting of salaries and benefits, and any other personel matters. He will also be in charge of the station's Equal Employment Opportunity Program. All station personel will ultimately report to him and be subject to his decisions. He will exercise overall supervisory responsibility for the programming and business operation of the station and will be responsible for all aspects of the day-to-day operation of the facility (Anchor Ex. 2, p. 2-3; Tr. 127-128).

15. Dr. Stamps has never lived in the Selbyville area. He proposes to live Monday through Friday within the predicted city contour, if not the city limits of Selbyville, should Anchor be the successful applicant (Anchor Ex. 2, p. 3; Tr. 140-141). Dr. Stamps, who is 62, has been retired since July 1, 1986 and has no current employment. His only business interests are real estate investment and securities which involve about 3 hours a month of his time (Tr. 76, 130-131). Dr. Stamps stated that after two years of retirement, during which time he has recovered from the sudden death of his wife, he is ready to return to work. If Anchor's application is not successful, he intends to pursue another broadcasting venture (Tr. 156-157).

DIVERSIFICATION

16. Neither Anchor nor any of its partners owns any interest in any medium of mass communications (Anchor Ex. 2, p. 1).

Selbyville Broadcasting Co., Inc.

17. SBC is a Maryland Corporation with one class of voting stock all of which is owned by Rita A. Capobianchi who is also President, Secretary, Treasurer and sole director (SBC Ex. 1).

18. Ms. Capobianchi proposes to work at least 40 hours per week at SBC's proposed station as General Manger (SBC Ex. 2, p.1). She is a Caucasian female who does not reside within the service area of SBC's proposed station but proposes to relocate her residence to such area in the event SBC's application is granted (SBC Ex. 2, p. 2). Ms. Capobianchi plans to limit her presence in the Selbyville area to Monday to Friday and return to her family home in Chevy Chase, Maryland on weekends (Tr. 506). No claim is interposed for broadcast experience in SBC Ex. 2.

19. Ms. Capobianchi's current employment is as Director of operations of DB Communications, Inc., a Bethesda, Maryland consulting radio engineering firm (SBC Ex. 2, p. 3). There she oversees "the operations of the office, entailing recruiting engineers, interviewing them, hiring, doing the financial quarterly reports for the company, sending the statements out, posting them, and overseeing, in general, the entire running of the offices" (Tr. 325).

20. Ms. Capobianchi holds 25 percent of the stock in DB Communications. Her husband, Darrell Bauguess, holds 51 percent of the stock. The remaining stock has not been issued (Tr. 324). In other words, Mr. Bauguess holds 67 percent (51.76) of the issued stock and his wife holds the remaining 33 percent. Also, Ms. Capobianchi and her husband are the sole directors in DB Communications. Ms. Capobianchi is also Secretary/Treasurer of the corporation (Tr. 324).

21. SBC's direct case states that she "will resign from her current employment as Director of Operations of DB." (SBC Ex. 2, p.2). She will, however, retain many of her ties to DB Communications. There is no evidence that she will sell her interest in DB, if indeed there would be any market for her minority share of this family company. At the time of the hearing, Ms. Capobianchi had not given thought to selling her ownership interest in DB Communications (Tr. 348). She was not prepared to make a firm commitment to sell (Tr. 349). In addition, there is no evidence that she will resign as Director and officer. More importantly, SBC presented no evidence o her ability to relieve herself of the substantial time commitment she now carries with respect to DB. There was no showing that her husband or other employees would be able to take over for her or that any steps had been taken or even consideration given to train someone else for her job.

22. A substantial amount of the prosecution costs for this application, including all legal fees paid up to the time of Ms. Capobianchi's deposition, have been paid by DB Communications. DB also prepared the engineering for the SBC

application (Tr. 323, 331, 382; Galaxy Exs. 3-5). Bauguess met with the banker to discuss SBC's loan. There was no written loan agreement between DB Communications and SBC, nor any resolution authorizing the payment of the costs (Tr. 328). She considered it a no-interest "officer advance" and she "just wrote a check [on DB's account]" (Tr. 329). There were no terms governing the advance (Tr. 329).

23. At the hearing, Ms.Capobianchi testified that she did not intend, at the time of her deposition, to continue paying prosecution costs with DB Communications funds (Tr. 378). This was a contradiction of her deposition testimony that she intended DB to continue to pay the prosecution expenses (Tr. 381).

24. Ms. Capobianchi testified that she no longer pays prosecution costs out of DB Communications fund (Tr. 340). She could give no reason for changing the practice (Tr. 341). She had her own personal checking account at the time the funds were taken from the DB Communications account. (Tr. 341), and therefore could have made the payments to her attorney herself. Ms. Capobianchi testified that her husband, the controlling owner of DB Communications, was not aware that she was giving herself these "officer advances" (Tr. 337). She never told him about it (Tr. 337, 339-340).

25. She denied that her husband told her not to use DB Communications funds for prosecuting the Selbyville application (Tr. 344, 408). Yet her husband's testimony was that he did tell her not to use DB Funds: "All I know is that I have directed her not to use DB Communications funds from this period [date of deposition testimony] on" (Tr. 410).

26. Ms. Capobianchi did not personally prepare any part of SBC's application. That portion not prepared by DBC was prepared by former counsel who had also performed legal work for another entity in which Mr. Bauguess (but not Ms. Capobianchi) had an interest (Tr. 509-510, 504-515). Ms. Capobianchi has been represented in connection with other

applications filed with the Commission by the same lawyer who represented Bauguess when he was deposed in this proceeding (Tr. 367, 370).

27. Ms. Capobianchi has pending applications for new FM stations at Murrells Inlet, South Carolina, and Charlottesville, Virginia, in addition to the Selbyville application (SBC Ex. 2, p. 1). Under cross examination, she testified that she intends to become integrated in the management of either the Murrells Inlet station or the Charlottesville station should she be unsuccessful in this application (Tr. 356-357). If the Charlottesville application is granted first, Ms. Capobianchi would "probably have to go with Charlottesville" (Tr. 370). By "go with Charlottesville," she meant that she would be involved directly in the management of the Charlottesville station and would probably be a full-time manager there (Tr. 454). Similarly, she would go with the Murrells Inlet proposal if it is granted first (Tr. 371). Neither the Charlottesville nor the Murrells Inlet applications contains any statement that if Ms. Capobianchi were to win Selbyville, she would dismiss either application (Tr. 362-363). On redirect examination, Ms. Capobianchi testified that she does not intend to abandon her "integration" for Selbyville when the South Carolina and Virginia application are designated for hearing (Tr. 521-522). When questioning brought out the inconsistency of her earlier testimony, she stated she had changed her mind (Tr. 523-526).

28. Bauguess and Ms. Capobianchi have three children, ages 7, 11 and 15. She has never had more than casual discussion with her husband as to who would care for them if she moves to Selbyville (Tr. 352-353). They will not accompany her to Selbyville and she plans to rely upon her husband (who is employed full-time at DBC) and her mother. She has not, however, discussed her plans with her mother (Tr. 371-372). She does not believe her mother (who does not reside with the family) will do more than she does now, which is to prepare dinner. She views her eldest two children as being self-sufficient (Tr. 504-505). The DBC offices are located in

close proximity to the Bauguess residence and the children's schools (Tr. 522-523).

DIVERSIFICATION

29. Neither SBC nor Rita A. Capobianchi has any other mass media interests directly (SBC Ex. 1, p. 1). However, Ms. Capobianchi's husband, Darrell Bauguess, holds a 15 percent interest in Ravena Broadcast Partners which has been granted a construction permit for a new FM station at Ravena, New York.

Galaxy Communications, Inc.

30. Galaxy is a Delaware Corporation with one class of voting stock. All of the stock is owned by Alexander Soroka who is also President and Chairman of the Board. Gregory Lanier Walls is a member of the Board of Directors and Secretary-Treasurer of Galaxy. He owns no stock (Galaxy Ex. 1, 1).

31. Soroka proposes to work at least 40 hours per week as General Manager at Galaxy's proposed station. No claim is made that Soroka is a minority or has broadcast experience (Galaxy Ex. 1, p. 2; Tr. 593).

32. As of October 1987, Soroka's permanent residence was in Laurel, Maryland (Tr. 569-570). On October 9, 1987, Soroka purchased a home in Selbyville and now spends 80% of his time there. The remaining time is spent in Maryland (Tr. 636-637). Soroka has not sold his Laurel residence; his son lives there (Tr. 570). During the summers of 1986 and 1987, Soroka lived in a trailer parked in a trailer park located at Fenwick Island, Delaware (Tr. 569, 571, 633). After the trailer park closed, on his periodic visits to the ocean, Soroka stayed at his brother's condominium in Ocean City, Maryland (Tr. 577).[1] Soroka was registered to vote in Maryland and filed his income tax in that state for the years of 1986 and 1987. Soroka did not file a tax return in Delaware for either

1986 or 1987. As of May 1988, he had not changed his voting registration to Delaware (Tr. 571, 572, 547).

33. Soroka became a member of the Lions Club of Selbyville, Delaware in January, 1988. His only activities have been in attending meetings and selling raffle tickets for an unspecified purpose in April 1988 (Tr. 572-574). Soroka has been elected as an officer of that organization for the coming year (Tr. 573).

DIVERSIFICATION

34. Soroka owns 1,022 shares of Westinghouse Electric Corporation stock (Galaxy Ex. 1, p. 3). Westinghouse Electric Corporation is the parent corporation of Westinghouse Broadcasting Company which holds various FCC licenses (Galaxy Ex. 1, p. 3). These shares represent less than .001 percent of the outstanding shares in Westinghouse Electric Corporation (Galaxy Ex. 1, 3). Soroka has no other interest in any medium of mass communications (Galaxy Ex. 1, p. 3).

Susan M. Bechtel

35. Susan M. Bechtel proposes no integration of ownership and management.

DIVERSIFICATION

36. Ms. Bechtel has no media interests.

AUXILIARY POWER

37. Anchor, SBC, Galaxy and Bechtel each propose to install an auxiliary power source to permit continued operation of the new station when electric power normally supplied by the local utility is interrupted (Anchor Ex. 2, p. 3; SBC Ex. 3, p. 1; Galaxy Ex. 2, p. 1; Bechtel Ex. 1, p. 1).

CONCLUSIONS

DIVERSIFICATION

38. Neither Galaxy, Bechtel nor Anchor has any attributable media interests. Soroka's Westinghouse stock is infinitesimally small compared to the overall ownership of the company. Therefore, Galaxy will not be assessed a diversification demerit. SBC receives a diversification demerit due to Darrell Bauguess' 15% interest in a new FM station in Ravena, New York. SBC has not rebutted the presumption that one spouse's media interests are attributable to the other. The demerit is only a slight one since Ravena is roughly 200 miles from Selbyville and Bauguess' interest is less than controlling.

COMPARATIVE COVERAGE

39. Bechtel will serve 712 more people than Galaxy (1.78%), 6,821 more people than SBC (20.27%), and 7,115 more people than Anchor (21.33%). No applicant proposes to serve any white, gray or underserved areas. The Commission has awarded slight preferences to applicants providing substantially greater overall coverage even where the additional area to be served is already well-served by five or more existing services. *Christian Broadcasting of Midlands, Inc.*, 99 FCC 2d 578, 582-583 (Rev. Bd. 1984). Since Bechtel and Galaxy will cover only about 20% more total population than SBC and Anchor, and since all of the areas involved are already well-served, Bechtel and Galaxy receive only "very slight" preferences for their coverage proposals. *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647 (Rev. Bd. 1973).

INTEGRATION

40. Anchor's 100 percent full-time integration proposal will be fully credited. Anchor's sole General Partner, Herman F. Stamps will serve in a managerial capacity and no evidence has been adduced undercutting the reliability of Stamps' integration proposal. The attacks on the reliability of Stamps' integration proposal are groundless and rest on

speculation and conjecture. It is alleged that Stamps has placed a 2 to 3 year limit on his proposed integration. Galaxy seizes on Stamps' defining "forseeable" as 2 to 3 years into the future (Tr. 133). However, it is clear that Stamps was merely indicating that he did not view the future as being foreseen beyond 2 to 3 years, rather than an indication that his commitment would expire at the end of that time period. Viewed in its entirety and in its proper light, the clear import of Stamps testimony is that his time commitment has no fixed duration, assuring the "permanence" required by the Commission. Anchor's opponents also urge that Stamps' proposal is not credible because of his "peripatetic lifestyle," his past vacations, his ownership of different residences and a boat and his age. These contentions which are fully refuted by Anchor's Reply, are bereft of evidential support and provide no basis to diminish Anchor's integration credit. Similarly, the fact that the District applicaton proposed the hiring of a general manager whereas here Stamps is proposed as general manager is of no consequence. As noted by Stamps, the situations are not comparable. The District application sought a license in a much larger market than Selbyvile (Tr. 79). Further, the fact that Stamps might at some point in the future hire a station manager does not raise doubt as to his integration commitment. There is no evidence that such possible staffing change would alter Stamp's full-time managerial participation in the station's day-to-day operations.

41. There is also no evidence suggesting that Anchor's limited partnership is a "sham." The typical "sham" arrangement features a minority and/or female general partner who has a minor equity interest, minimal financial input and no prior relationship with the non-minority limited partners. Here, on the other hand all the principals are minority members with equal equity interests, equal financial responsibilities who have known each other over a long period to time. Further, Anchor's Agreement contains the requisite provisions restricting the limited partners to a passive role. There is no evidence that the limited partners have been actively involved in the preparation and prosecution of

Anchor's application or would assume an active role if the application was granted. As recited in paragraph 10, *supra,* the four partners are fully aware of the provisions of the Agreement precluding participation in partnership affairs by the limited partners and all have pledged to adhere to those restrictions. The presiding Judge has no reason to question the sincerity of their pledges. Moreover, the fact that the financial contributions set forth in the Agreement cover only prosecution expenses and that contributions to cover costs of construction and operation were initially set forth in an oral agreement, subsequently confirmed in writing, does not raise questions as to the *bona fides* of the limited partnership.

42. Anchor's proposal is qualitatively enhanced by Stamps' status as a minority as well as his proposed future residence in the service area. Anchor is entitled to slight credit for proposing auxiliary power.

43. SBC seeks 100 percent integration credit based on the proposed integration of its sole stockholder, Rita A. Capobianchi. SBC's integration proposal will not be credited. Ms Capobianchi currently oversees "the entire running of the office" of DB Communications, the consulting engineering firm wholly owned by Ms. Capobianchi and her husband. She baldly states that she will "resign" form her position with DB Communications. However, she has utterly failed to demonstrate her ability to effectuate that fundamental change in her work responsibilities. No evidence has been offered showing how her critical responsibilities would be discharged while she is required to be in Selbyville at the radio station. The likelihood of the effectuation of Ms. Capobianchi's integration pledge is further rendered questionable by Ms. Capobianchi's unwillingness to dispose of her ownership interest in DB Communications and resign as an officer and one of the two directors of the company. In these circumstances, SBC has failed to meet its evidentiary burden in support of its claim for integration credit. *See Blancett Broadcasting Co.,* 17 FCC 2d 227 (Rev. Bd. 1969); *see also Fort Collins Telecasters,* 60 RR 1d 1401, 1407, 1408 (Rev. Bd. 1986).

44. Moreover, the operations of SBC to date (see paragraphs 22-26, *supra),* requires a conclusion that Ms. Capobianchi will not be in full control of SBC but rather that it, like DB Communications (DB) would be a family business involving (if not controlled by) Ms. Capobianchi's husband, Darrell E. Bauguess. To cite some examples, a substantial amount of the prosecution costs have been paid by DB; DB also prepared the engineering for the SBC application; Bauguess met with the banker to discuss SBC's loan; Ms. Capobianchi played very little role in the preparation of her application; the portion of the application not prepared by DBC was proposed by counsel who had also provided services to another entity owned by Bauguess. The record revelations concerning DB's and Bauguess' involvement in SBC may be merely the tip of the iceberg in light of Ms. Capobianchi's unwillingness to be candid and forthcoming when probed at the hearing. The unreliability of SBC's integration commitment is accentuated by Ms. Capobianchi's inconsistent testimony with respect to her integration plans for her other FM applications. The record makes unmistakably clear that Ms. Capobianchi intends to hedge her bets among her three pending applications in Selbyville. Charlottesville and Murrells Inlet. Her integration proposal for Selbyville is, thus, contingent on the lack of grant of the other two applications during the pendence of this proceeding. Ms. Capobianchi's last minute change of mind and claim of fealty to Selbyville is not believable and is not accepted. No quantitative integration credit is awarded to SBC.[2]

45. Galaxy receives 100% integration credit based on the proposed integration of its sole stockholder, Alexander Soroka. Soroka will serve in a managerial capacity and no evidence has been adduced which raise doubt concerning his intention to fulfil his integration commitment. Galaxy also receives very slight credit for Soroka's local residence, established long after the filing of Galaxy's application. The Commission is primarily interested in residence of "several years' duration." *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965). Only "spare" credit has been

awarded even where local residence was established 15 months prior to the filing of an application, *MTF Enterprises*, 99 FCC 297 (Rev. Bd. 1984). In this connection, Soroka's earlier summer sojourns in a trailer park and his periodic visits to his brother's condominium in Ocean City, Maryland to enjoy the ocean's delights were too temporary to warrant residential recognition. Galaxy also receives very slight credit for Soroka's recent and *de minimis* civic involvement with the local Lions Club. Galaxy also receives auxiliary power credit.

46. Bechtel does not seek and receives no integration credit. Bechtel receives auxiliary power credit.

COMPARATIVE CONCLUSION

47. Anchor is the comparatively superior applicant. Anchor and Galaxy have established their entitlement to 100% integration credit. Also, Anchor and Galaxy suffer no diversification demerit. However, Anchor prevails on qualitative enhancement. Anchor's substantial credit for 100% minority involvement, future local residence, and auxiliary power credit outweighs Galaxy's very slight credit for recent local residence,[3] recent and *de minimis* civic activity, auxiliary power credit, and very slight comparative coverage advantage. Therefore, Anchor's application is granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[4] the application of Anchor Broadcasting Limited Partnership for a construction permit for a new FM station on Channel 250A in Selbyville, Delaware IS GRANTED; and the applications of Selbyville Broadcasting Co., Inc., Galaxy Communications, Inc. and Susan M. Bechtel ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

1. Ocean City is within the 3.16 mV/m contour of the proposed station.

2. Assuming credit was awarded, SBC's proposal would be enhanced by her female status, proposed future local residence, and slight auxiliary power credit.

3. Local residence of "several years" duration as contemplated by the *Policy Statement* is of equal significance with minority ownership. *Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985). However, Soroka's local residence is only of short duration.

4. In the event exceptions are not filed within 30 days after the release of this initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States of America provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual time of War or public danger; nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb, nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Section One and Section Five of the Fourteenth Amendment to the Constitution of the United States of America provide as follows:

> **SECTION. 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

5 U.S.C. § 556(d) provides:

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law Number 100-202, 101 Stat. 1329 (1987) are as follows:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, *as amended*, 55 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C. 2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales,

> licenses, applications or proceedings, which were suspended pending the conclusion of the inquiry.

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-457, 102 Stat. 2216-17 are as follows:

> For necessary expenses of the Federal Communications Commission . . . *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, of to continue a reexamination of, the policies of the Federal Communications Commission with respect of comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C. 2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than those to close MM Docket 86-484 with a reinstatement of prior policy and lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry . . . .

Supreme Court, U.S.
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JUL 2 1992
OFFICE OF THE CLERK

No. 91-1744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GALAXY COMMUNICATIONS, INC.
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ANCHOR BROADCASTING LIMITED PARTNERSHIP IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether petitioner has shown cause for having the Court ignore the principle of *stare decisis* to consider the constitutionality of the FCC's minority preference, which was decided by this Court in Metro Broadcasting, Inc., 110 S. Ct. 2997 (1990).

Whether petitioner has shown that the questions it raises are of such imperative public importance as to issue a writ of certiorari when the Court below has not issued a final judgment and petitioner currently argues that it is entitled to have its application granted by the FCC irrespective of the opinion of the Court of Appeals.

Whether petitioner is entitled to raise its argument concerning the constitutionality of the minority preference when it did not make that argument before the Federal Communications Commission, and a statute requires exhaustion of administrative remedies as a condition precedent of judicial review.

Whether the determination that the award of integration credit to Anchor is supported by substantial evidence was correct when its partners did not refuse any order to answer a question.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ANCHOR BROADCASTING LIMITED PARTNERSHIP IN OPPOSITION

Respondent Anchor Broadcasting Limited Partnership (Anchor) now opposes the petition for writ of certiorari filed by Galaxy Communications, Inc. (Galaxy) on April 30, 1992 and received by respondent on May 4, 1992.

OPINIONS BELOW

The relevant opinions are reproduced in the appendices to Galaxy's petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A pertinent statutory provision is 28 U.S.C. §2101(e) (1982), which reads as follows:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

A second pertinent statutory provision is 47 U.S.C. §405(a) (1991 Supp.), which reads as follows:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under Section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority, making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under Section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action,

or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which Section 402(a) of this title applies, or within which an appeal must be taken under Section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

STATEMENT OF THE CASE

The proceeding in question involves the applications of Anchor, Galaxy and Susan M. Bechtel (Bechtel) for a construction permit for a new FM radio station on Channel 250A at

Selbyville, Delaware. Those applications (along with several other applications that were subsequently dismissed) were designated for hearing before an Administrative Law Judge.

On July 24, 1989, the Administrative Law Judge released his decision granting Anchor's application. Pet. App. B 72a. The Administrative Law Judge ruled that Anchor and Galaxy were equal under the factor of diversification of mass media. Pet. App. B 89a. He also held that both applicants were entitled to full (100 percent) credit for their respective proposals to participate full time in station management (known as integration of ownership into management). *Id.* He also held that both applicants were entitled to credit for proposing auxiliary power. *Id.* Bechtel was deemed an inferior applicant because she received no credit for participation in station management. *Id.*

When an applicant receives credit for integration of ownership into management, the Federal Communications Commission (FCC) also examines certain factors that enhance the applicant's integration proposal. Those factors include an applicant's residence within the service area of its proposed station, its civic involvement in the service area, and its broadcast experience. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-396 (1965). As noted in *Metro Broadcasting, Inc.*, 110 S. Ct. 2997, 3004-3005 (1990), the FCC now considers minority ownership to be another "plus" when a minority owner proposes to participate in station management.

The Administrative Law Judge awarded Galaxy only very slight credit for local residence and civic involvement because its sole stockholder established a residence within its service area only after it filed its application. Pet. App. B 88a-89a. Anchor received credit for general partner Herman Stamps' status as a minority and for his proposal to establish a resi-

dence in the service area. Pet. App. B 87a. Galaxy and Bechtel also received very slight preferences over Anchor because they proposed to serve about twenty percent more people who already received five or more existing services. Pet. App. B 85a. The Administrative Law Judge granted Anchor's application because Anchor's credit for minority involvement and future local residence outweighed Galaxy's very slight credit for local residence and civic involvement and very slight comparative coverage advantage. Pet. App. B 89a.

The FCC's Review Board, an intermediate appellate body within the agency, reversed the Administrative Law Judge and granted Galaxy's application because it decided that Anchor was not entitled to credit for integration of ownership into management. Pet. App. B 29a. The full FCC then decided that Anchor was entitled to complete, 100 percent integration credit and reinstated the Administrative Law Judge's decision. Pet. App. B 16a. The FCC evaluated the testimony of Anchor's partners and found that they would comply with the standards for insulating the limited partners from control of the station. Pet. App. B 18a-21a. The FCC also rejected arguments that Mr. Stamps would not work at the station on a permanent basis and that he would not move to Selbyville. Pet. App. B 21a-25a. The FCC held that Anchor was the superior applicant because although both Galaxy and Anchor received full integration credit, Anchor's "enhancement for its minority ownership and future residence outweigh the very slight credit awarded Galaxy for local residence and civic activities and for its coverage proposal." Pet. App. B 26a (footnotes omitted). In a footnote, the FCC rejected Bechtel's argument that it should abandon integration of ownership into management as a basis for awarding construction permits. Pet. App. B 27a n.4.

Both Galaxy and Bechtel appealed the FCC's decision to the United States Court of Appeals for the District of Columbia

Circuit. As that Court noted, Galaxy's appeal emphasized its argument that Anchor was entitled to no integration credit. Pet. App. A 7a. The Court of Appeals rejected that argument. Pet. App. A 7a-9a. In doing so, it found, "...Dr. Stamps' allusions to the privilege against compulsory self-incrimination and to differences between the 'real world' and the partnership agreement can reasonably be regarded as the overly careful responses of a witness worried about unforeseen hypotheticals during cross-examination." Pet. App. A 9a n.5.

In a footnote, the Court of Appeals noted Galaxy's argument that Anchor's minority preference was unconstitutional "because it was the dispositive factor in Anchor's licensing victory in this case..." Pet. App. A 7a n.4. The Court declined to reach that argument because Galaxy did not make that argument before the FCC. *Id.*

Bechtel's appeal challenged the FCC's continued reliance upon the integration criterion in light of two subsequent policy changes. The Court of Appeals held that the FCC erred in failing to reach the substance of Bechtel's argument. Pet. App. A 11a-15a. It remanded the proceeding to the Commission with instructions "to respond to Ms. Bechtel's challenges and to consider her application in light of those challenges." Pet. App. A 15. It also held that if the Commission decided to change its policy, "it is free to do that however it wishes." *Id.*

Following the remand order, the applicants filed comments at the FCC's invitation. In its comments, which were filed on April 6, Galaxy urged that the Commission modify its criteria for choosing applicants in several respects. Galaxy's comments are reproduced as Appendix A to this opposition. Specifically, Galaxy suggests that (1) substantial credit for local residence be awarded regardless of whether the owners propose to be integrated into management, and (2) that an applicant proposing to cover fifteen percent or more greater

population than its competitors receive "a preference similar in weight to the integration criterion." App. A 3a. If the FCC adopted Galaxy's proposal and applied them to this proceeding, Galaxy could be the superior applicant regardless of whether Anchor received a minority preference. The FCC has not yet acted on the Court of Appeals' opinion or the applicants' comments.

SUMMARY OF ARGUMENT

This Court should refuse to issue the requested writ because the constitutional question for which Galaxy seeks review was recently decided by this Court in *Metro Broadcasting, Inc.*, 110 S. Ct. 2997 (1990). Galaxy's attempt to distinguish this case from *Metro* on the facts has no merit.

The opinion of the Court of Appeals is not a final judgment, and Galaxy has not shown that this case is of such public importance as to require immediate consideration. Indeed, Galaxy has urged revisions to the FCC's criteria for choosing broadcast applicants that could result in its application being granted regardless of whether Anchor receives a minority preference.

Galaxy waived its right to challenge the constitutionality of the minority preference by not making its constitutional argument before the FCC. The requirement that Galaxy exhaust its administrative remedies is mandatory in this case because the exhaustion requirement is contained in a statute. The exhaustion requirement applies to constitutional arguments. Moreover, the exhaustion requirement is particularly applicable in this case where the argument is directed against the FCC's own policy as opposed to a statute.

Galaxy's argument that Anchor's general partner refused to answer questions or invoked a privilege against self-incrimination is specious. Dr. Stamps never refused an order

of the Administrative Law Judge to answer a question. No such privilege was invoked, nor were any conceivable questions raised concerning criminal conduct by Dr. Stamps. The Commission and the Court of Appeals correctly concluded that Dr. Stamps' reference to self-incrimination was the natural response of a witness faced with hostile cross-examination.

REASONS FOR DENYING THE WRIT

A. Galaxy Has Not Shown Cause For Having This Court Consider A Question It Resolved Only Two Terms Ago.

1. Applicability of *Metro* and the *stare decisis* principle

In *Metro Broadcasting, Inc.*, 110 S. Ct. 2997, 3002 (1990), this Court held that the FCC's "program awarding an enhancement for minority ownership in comparative proceedings for new licenses" did "not violate equal protection principles." Galaxy now seeks to have the Court reconsider that exact same question. It would be a waste of the Court's scarce resources to consider the same issue twice in such a brief period. A grant of Galaxy's petition would also do violence to the doctrine of *stare decisis*.

This Court has repeatedly recognized "the central importance of *stare decisis* in this Court's jurisprudence." *Hilton v. South Carolina Public Railways Commission*, 112 S. Ct. 560, 569 (1991). In *Hilton*, Justice Kennedy noted, "Adherence to precedent promotes stability, predictability, and respect for judicial authority" and that the Court "will not depart from the doctrine of *stare decisis* without some compelling justification." *Id.* While *Hilton* involved a question of statutory interpretation, the Court noted in *Welch v. Texas Highways & Public Transportation Department*, 483 U.S. 468,

478-479 (1987) that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*" in constitutional cases as well as statutory cases.

The principle of *stare decisis* applies with particular force in this case. If the Court reversed its *Metro* holding only a short time after that decision was issued, it would necessarily raise questions about the stability and predictability of the law. In *Hilton*, the Court found *stare decisis* as an important justification for following a twenty-seven year old case. The justification for applying *stare decisis* to this question is particularly strong because *Metro* was decided very recently and because Galaxy has offered no new facts or rationale for overruling *Metro*.

2. Application of *Metro* to this case

Galaxy argues that the *Metro* holding does not apply to this case because while race was just one of many factors considered in *Metro*, Anchor allegedly received a *per se* preference based upon Dr. Stamps' minority status. Pet. 10-11. Galaxy's argument that Anchor received a *per se* preference is just plain wrong. Both the Administrative Law Judge's decision and the FCC's decision make clear that minority status was only one of many factors considered in granting Anchor's application. Pet. App. B 26a, 89a. Thus, if Galaxy had been successful in arguing (as it was before the Review Board) that Anchor was not entitled to credit for integration of ownership into management, Galaxy would have prevailed regardless of the minority status of Anchor's general partner. Anchor would not have received any minority enhancement in that case. Moreover, if Galaxy's principal had offered a more substantial record of local residence or civic involvement, it may have prevailed. The fact that Anchor's minority preference tipped the balance in its favor does not make the minority preference

a *per se* preference. Contrary to Galaxy's suggestion at Pet. 8-9, the FCC recognized in *Metro* that the minority preference was, by itself, a potentially decisional factor. *Metro Broadcasting, Inc., supra,* 110 S. Ct. at 3006. The Commission recognized that any advantages Galaxy had under local residence and civic involvement were very minor because its principal only moved to its service area after its application was filed. Pet. App. B 26a and 28a n.8.

At Pet. 11, Galaxy suggests that the FCC gives too much weight to the minority preference in comparison to the applicants' technical proposals. The FCC's policy is that coverage to areas that currently receive five or more signals is not as important as integration of ownership into management and qualitative attributes such as minority ownership and local residence. *Barton Broadcasting Co.,* 104 FCC 2d 785, 791 (Rev. Bd. 1986). On the other hand, an applicant that will serve underserved areas and populations can receive a substantial advantage, especially if the applicant will serve areas or populations that receive no broadcast service. *Washoe Shoshone Broadcasting,* 5 FCC Rcd 5561, 5564 (1990). None of the applicants in this case will serve any areas or populations that currently receive five or fewer services. Pet. App. B 74a. If it is constitutional to award a minority preference, the weight to be given that preference is clearly within the FCC's discretion to license applicants in the public interest. Galaxy's argument concerning the weight to be given an applicant's coverage proposal is also currently before the FCC pursuant to the Court of Appeals' remand. No reason exists for this Court to consider an argument that the FCC currently has under its consideration. The constitutionality of the minority preference in this case was squarely ruled upon in *Metro* and need not be decided again.

3. Galaxy's discussion of Bakke misstates the FCC's criteria for choosing applicants

Galaxy urges the Court to reconsider its holding in *Metro* because of an alleged distinction between the FCC's minority preference and the preference in issue in *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Pet. 12-15. This Court has considered the applicability of the diversity rationale in Bakke to the FCC's minority preference. *Metro Broadcasting, Inc., supra*, 110 S. Ct. at 3010-3011. Reconsideration of this same question only a few years later would do violence to the principle of *stare decisis*.

If the Court examines Galaxy's argument, however, it will discover that its argument is based upon a fundamentally incorrect premise. Galaxy urges that Justice Powell anticipated that race would only be one of many factors considered in an attempt to obtain diversity. Pet. 13. It then argues that the FCC's minority preference is fundamentally flawed because minority status is the only decisional factor that considers diversity. *Id.* An examination of the FCC's criteria, however, shows that several of those criteria measure an applicant's diversity. Thus, Galaxy's argument must fail.

This Court has noted that diversification of control of mass media communications is one of the criteria the FCC uses to choose among applicants. *Metro Broadcasting, Inc., supra*, 110 S. Ct. at 3004. When the FCC established its comparative criteria, it made diversification of mass media "a factor of primary significance..." *Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d at 394. It found, "Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Id.* (footnote omitted). In making that judgment, the FCC relied upon the First Amendment's " 'assumption

that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...' " *Id.* at 394 n.4, *citing Associated Press v. United States,* 326 U.S. 1, 20 (1945). Thus, the FCC has made diversity a central goal of its licensing scheme and has made diversity of ownership a primary comparative factor.

Other criteria used by the FCC to choose among applicants consider the diversity an applicant will offer. Proposed program service is one of the factors the Commission may look at in choosing between applicants. *Metro Broadcasting, Inc., supra,* 110 S. Ct. at 3004. An applicant that proposes a specialized programming format (*e.g.*, foreign language or minority-oriented format) may receive a preference if it can show a need for the format and that the format is not available in a substantial amount. *George E. Cameron, Jr. Communications,* 71 FCC 2d 460, 464-466 (1979). The award of a preference for such a specialized format represents an attempt to reward diversity.

Moreover, a non-minority applicant that believes it could show special sensitivity to minority needs and interests can attempt to obtain equal or greater credit than an applicant with minority ownership. In *TV 9, Inc. v. FCC,* 495 F.2d 929, 941 n.3 (Supp. Opn.) (D.C. Cir. 1974), the Court of Appeals invited applicants who were not minorities to prove that they could better serve "the public interest in promoting diversification of opinion and viewpoint..." In *San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 601-603 (Rev. Bd. 1983), the Commission's Review Board confirmed that such showings should be considered if they contain material and relevant evidence. Galaxy did not attempt such a showing in this case, but it had every opportunity to show that the "equities of the case" favored a grant of its application. It did not do so.

B. The Supreme Court Should Not Grant The Requested Writ Because The Court of Appeals Has Not Issued A Final Judgment And Galaxy Has Not Shown Cause For Consideration Of Its Appeal At This Time.

While this Court has the authority to review a case before a court of appeals has rendered judgment (28 U.S.C. §2101(e) (1982)), such a petitioner must show "that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court". S. Ct. R. 11. In this case, the Court of Appeals did not issue a final judgment. Instead, it remanded the proceeding. Galaxy's petition must be denied because it has not even attempted to show how its petition complies with this Court's Rules.

Prudential considerations support the denial of Galaxy's petition. In comments filed with the FCC after the Court of Appeals' remand, Galaxy and Bechtel have offered arguments that their applications should be granted regardless of whether Anchor receives its minority preference. If the Court issues a writ at this time, it would be considering a question that could become moot. This Court does not exist to consider questions that may not be meaningful in a case. Premature consideration of this case could be a waste of the Court's valuable resources.

Galaxy has not listed any benefits that would arise from early consideration of this case, and no such benefits are apparent. The question in issue does not rise to a question of "imperative public importance", especially since this Court has very recently resolved the precise constitutional question in issue. The question does not rise to the level of importance posed by the questions in *United States v. Nixon*, 418 U.S. 683 (1974), where early review was granted. The litigation does

not require an early resolution of the constitutional question. Issuing a writ at this time would represent an unwise use of this Court's resources without providing any benefits to the public or to the litigants. Accordingly, Galaxy's petition would have to be dismissed for failure to comply with S. Ct. R. 11 even if the petition would otherwise be granted.

C. Galaxy Waived Its Right To Challenge The FCC's Minority Preference By Not Exhausting Its Administrative Remedies

As noted above, the Court of Appeals did not reach the merits of Galaxy's constitutional challenge because Galaxy did not make that argument before the FCC. Pet. App. A 7a n.4. Galaxy challenges that ruling by arguing that the FCC was not competent to pass upon the constitutionality of the minority preference and because Congressional legislation would have made agency review a "futile exercise". Pet. 15-17. The Court of Appeals' ruling was correct because a statute required Galaxy to make its argument before the FCC and because the FCC is a competent agency to consider constitutional claims.

This Court has recognized two types of situations where a litigant is required to exhaust its administrative remedies by making all of its arguments before the agency. If a statute does not set forth an exhaustion requirement, "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme". *Patsy v. Florida Board of Regents*, 457 U.S. 496, 502 n.4 (1982). If Congress imposes an exhaustion requirement by statute, however, exhaustion of administrative remedies is mandatory. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989). Here, Galaxy was required to make its argument before the FCC because Congress set forth an explicit exhaustion requirement. 47 U.S.C. §405(a)

makes the filing of a petition for reconsideration "a condition precedent to judicial review" when a party "relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass". For reasons unknown, Galaxy never challenged the constitutionality of the minority preference at any level before the FCC. Indeed, Galaxy did not raise this issue before the FCC in its comments for remand. This Court has interpreted similar statutes to deprive a court of jurisdiction to consider an argument not raised before the agency absent extraordinary circumstances. *EEOC v. FLRA*, 476 U.S. 19, 23 (1986). Since Galaxy did not meet the "condition precedent to judicial review," the Court of Appeals correctly concluded that it could not consider Galaxy's constitutional challenge.

Galaxy suggests that the exhaustion of administrative remedies doctrine should not apply because the issue involved is constitutional. Pet. 16, *citing, inter alia, Johnson v. Robison*, 415 U.S. 361, 368 (1974). This argument suffers from several defects. First, Galaxy's argument is irrelevant because Congress established a specific and mandatory exhaustion requirement with no exception for constitutional arguments. Galaxy's argument would be relevant if this Court were deciding whether exhaustion was an appropriate requirement, but Congress has already made that judgment. Second, the United States Court of Appeals for the District of Columbia Circuit has demonstrated that the exhaustion requirement of 47 U.S.C. §405(a) applies to constitutional arguments. In *Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465, 470-471 (D.C. Cir. 1989), *cert. denied* 110 S. Ct. 757 (1990), the Court of Appeals ruled that a petitioner's constitutional arguments which had not been first presented to the agency were barred from subsequent judicial consideration by Section 405.

The cases cited by Galaxy are not applicable to this situation. *Weinberger v. Salfi*, 422 U.S. 749, 766-767 (1975) is inapplicable because the relevant statute setting forth the requirements for judicial review did not, unlike 47 U.S.C. §405(a), require that every question of law be presented before the relevant official (the Secretary of Health, Education and Welfare). Instead, the statute required a "final" decision. The Court noted that the statute gave the Secretary discretion to define a "final" decision so as to not require full exhaustion of administrative remedies on every question. Most significantly, the Secretary in *Weinberger* did not challenge the sufficiency of the claimant's attempts to exhaust administrative remedies. The Court interpreted the Secretary's actions to be a determination that a "final" decision existed and that judicial review was appropriate. Here, the statute specifically required that each question of law be presented before the FCC as a "condition precedent" of judicial review. Galaxy did not meet that condition precedent. Moreover, while the Secretary in *Weinberger* implicitly determined that the requirements for judicial review had been met, the FCC has challenged Galaxy's right to judicial review because Galaxy never made its argument before the FCC.

The other cases cited by Galaxy have no applicability to this situation. The issue of exhaustion of administrative remedies was not directly before this Court in *Johnson v. Robison*, 415 U.S. 361 (1974) because the government agency did not appeal the lower court's refusal to dismiss the complaint based upon failure to exhaust administrative remedies. *Id.*, 415 U.S. at 366 n.7. *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958) involved a state statute and a state administrative agency and is therefore inapplicable. Justice Harlan's concurring opinion in *Oesterich v. Selective Service Board*, 393 U.S. 233, 242 (1968) involved an agency that had no power to promulgate any regulations and is therefore inapplicable.

The legislation cited by Galaxy (Pet. App. C 92a-93a) does not excuse Galaxy's failure to make its argument before the Commission. Congress established the mandatory exhaustion requirement. Galaxy could have very easily preserved its position by objecting to the minority preference and giving a brief basis for its objection. The FCC could then have given its reasons why it believed the minority preference was constitutional. The other parties also would have been placed on notice that one of the criteria the Commission used to choose applicants was being challenged in this case. When Galaxy ignored the statutory requirement that it make its argument before the FCC, it deprived the FCC of an opportunity to respond to that argument at the agency level. In light of the explicit statutory exhaustion requirement and the lack of any valid reason why Galaxy could not have made its argument before the FCC, this Court must agree with the Court of Appeals that Galaxy waived its right to challenge the minority preference.

D. Dr. Stamps' Casual Reference To Self-Incrimination Does Not Mean He Refused To Answer Questions Or That The FCC's Decision Is Not Supported By Substantial Evidence

In its final argument, Galaxy alleges that the FCC's decision is not supported by substantial evidence because Dr. Herman Stamps, Anchor's general partner, allegedly refused to answer two questions and invoked the privilege against self-incrimination. Pet. 17-20. Galaxy's argument is based upon a highly misleading excerpt of the hearing transcript and ignores the plain import of the FCC's and the Court of Appeals' rulings.

A complete excerpt of the portion of the transcript section in question is provided as Appendix B to this opposition. That

excerpt reveals that after Galaxy's counsel made his comment about the "real world", he asked the Administrative Law Judge to direct Dr. Stamps to answer. The Administrative Law Judge refused to do so because he saw "no purpose in these general questions" and directed counsel to ask more specific questions. App. B 5a. Anchor cannot be faulted for not directly responding to a question that the Administrative Law Judge found improper. With respect to Dr. Stamps' casual reference to self-incrimination, Galaxy waived any right to complain about the responsiveness of Dr. Stamps' answer because it never asked the Administrative Law Judge to require Dr. Stamps to give a more complete answer. App. B 7a. Galaxy's petition fails to inform the Court of these important facts which show that Dr. Stamps never refused to comply with an Administrative Law Judge's order to answer a valid question.

In any event, the FCC thoroughly reviewed the testimony in question and found substantial evidence to support its ruling. Pet. App. B 18a-21a. Contrary to Galaxy's assertion that Dr. Stamps would have admitted he would have discussed station business with his limited partners (Pet. 20), the FCC reviewed testimony of all four of Anchor's partners and found that they all testified they would honor Anchor's limited partnership agreement. Pet. App. B 21a. The Court of Appeals referred to that testimony and affirmed the FCC's treatment of the testimony in issue "as the overly careful responses of a witness worried about unforeseen hypotheticals during cross-examination". Pet. App. A 9a n.5. No actual privilege against self-incrimination was ever invoked. Under these circumstances, the question of whether the FCC's decision was supported by substantial evidence was a routine determination that hardly constitutes an important federal question worthy of this Court's attention.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Date: July 2, 1992

APPENDIX A

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In re Applications of	)	MM DOCKET NO. 87-504
	)	
ANCHOR BROADCASTING LIMITED PARTNERSHIP	)	File No. BPH-860917MD
	)	
GALAXY COMMUNICATIONS, INC.	)	File No. BPH-860918NY
	)	
SUSAN M. BECHTEL	)	File No. BPH-860918OV
	)	
For Construction Permit for a New FM Station on Channel 250A in Selbyville, Delaware	)	

To: The Commission

COMMENTS

Galaxy Communications, Inc., by its attorneys, hereby offers the following comments in response to the *Order* of the General Counsel, FCC 92I-015, released March 16, 1992.[1] In *Bechtel v. FCC*, Case No. 91-1112 (D.C. Cir. Jan. 31, 1992), the United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings to address Susan Bechtel's arguments

[1]As discussed in Galaxy's Request for Extension of Time, filed April 2, 1992, the copy of the *Order* designated for Galaxy's counsel was erroneously sent to an address from which counsel moved almost three years ago. Therefore, Galaxy had no knowledge of the *Order* until it received the Comments of the other parties, who kindly consented to Galaxy's filing of these Comments at this time.

challenging the continued use of the integration criterion under the standard comparative issue. In the March 16 *Order*, the General Counsel sought the comments of the parties as to the appropriate action to be taken in the wake of that remand.

Following the remand, the Commission at an open meeting held on March 12, 1992, initiated a rule making proceeding in GC Docket 92-52 looking toward modification or even elimination of the integration criterion. While the text of the Commission's rule making notice has not yet been released, it appears from the press release of that action that the Court's decision in *Bechtel* has raised doubts within the Commission as to the validity of the management participation as an overarching, all-determinative factor in comparative proceedings. The press release also indicates that the Commission's current intention is to apply whatever modifications it may make to its policies on comparative criteria on a prospective basis only.

Galaxy submits that if the Commission now finds that integration of ownership and management is not as important as it was once perceived to be, it cannot, in light of the Court's mandate, apply that result only on a prospective basis. Bechtel, in her appeal, argued for a change in Commission policy as applied to her own proposal. It would hardly work justice for the Commission to concede that Bechtel was right, and that it should not keep integration of ownership and management as a factor of overwhelming importance, while continuing to do so in this very case. Indeed, if the Commission should determine that there is only a tenuous link between owner participation in management and station performance, it cannot justify perpetuation of the grant to Anchor.

At the same time, Galaxy does not agree with Bechtel's contention that the integration criterion should be scrapped altogether. Contrary to Bechtel's assertion, there have been numerous cases where station owners have fulfilled integra-

tion commitments, and have proven more responsive to the needs of the community than would have been the case for absentee owners. Therefore, Galaxy suggests that the Court's mandate may be fulfilled through a thorough review of the comparative criteria, and by certain sensible readjustments.

Thus, for example, as Galaxy will propose in comments to be filed in the general rule making, the Commission should return to its pre-1965 policy of awarding substantial credit for local residence independent of integration credit. A station owner who has lived in the community of license has gained a knowledge of the community's needs which will be reflected in station programming even if the owner is not physically at the station the minimum twenty hours per week required for integration credit. Consequently, local residence ought to be recognized in a significant way independent of integration credit.

Similarly, the Commission should make clear that where an applicant has engineered its proposal to cover 15 percent or more greater population than its competitors, that applicant deserves a preference similar in weight to the integration criterion. Obviously, it cannot mean much for residents who lack *any* service from a station to know that its owner is happily spending forty hours per week at the studio. Such a substantial difference in comparative coverage should be treated as a preference of equal importance with a mere qualitative enhancement of full time integration credit.[2]

While the above constitutes the core of Galaxy's views as to the appropriate disposition of this case in the wake of the Court's action, Galaxy recognizes that other parties may not

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[2]In this regard, Galaxy notes that Bechtel pressed its advantage for comparative coverage throughout this proceeding. However, Bechtel's site is across the road from that proposed by Galaxy. Accordingly, the differences between Bechtel and Galaxy are very slight, whereas both Bechtel and Galaxy have a substantial advantage over Anchor.

have interpreted the General Counsel's *Order* as calling for any views as to the substantive issues posed by this case. Therefore, it would appear most appropriate for the Commission to withhold further action in this case until it has decided whether and to what extent to modify the use of the integration criterion generally. Upon the conclusion of the general notice and comment proceeding, the Commission should immediately call for briefs as to the application of the Commission's new policy to this proceeding. Once the Commission has the benefit of the comments and deliberations prompted by the remand, both the Commission and the parties will be in a far better position to assess and address the appropriate outcome of this particular case. Only then can the Commission stand on firm ground in defending that outcome before the courts.

Respectfully submitted,

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April 6, 1992

APPENDIX B

*****

Q. Well, what is your expectation about how the actual relationship among the partners is going to work?

A. Well, I am afraid to answer that question because I know what is expected of me by law. Now, when you say talk about, well, you know, like somebody might yell down the street something and that might constitute talking about it. So I don't know how to answer that question according to the law.

I mean there's a real world, and then there's this. Right here I am going by this.

Q. But in the real world you expect that you probably will have —

A. I would not admit that any darn way.

Q. Excuse me?

A. I would never answer you on that one, sir.

MR. WOOD: I direct the witness to answer, your Honor.

MR. COHEN: First of all, your Honor, I don't think the question was asked, so I don't know what the witness was answering. Mr. Wood was interrupted by the witness —

JUDGE CHACKIN: Mr. Wood, if you want to ask some specific questions, and ask them if he construes, or it's his understanding that this provision would bar that, or permit that, you can do so. I see no purpose in these general questions. If you want to come up with some kind of hypothesis you can ask him that question. He has this language in front

of him and you can ask would that bar him from doing that and his understanding.

BY MR. WOOD:

Q. If you were to meet with Dr. Smith for instance in a party at his home I believe Portal Road, and there were other individuals that are present who wanted to know about the station in Selbyville, would this provision bar Dr. Smith from talking to these other people in your presence about what was going on with the station in Selbyville?

A. This provision does not bar Dr. Smith from talking to anybody else.

Q. Well, what about when you are present?

A. In my presence? I can't stop him from talking to somebody else. I don't read that in here.

Q. Well, you can't stop him from talking to you either about the station affairs, right?

A. That's true. Stop. But "communicate" would imply an exchange.

Q. But you do intend to talk to him about the business of the station, don't you?

A. Not according to this, no. This says nor shall any communication between the general partner or other partnership on matters of day to day operations.

Now, you can talk about the outside of the business but not the day to day operations of this or any other media enterprise. I think I understand the restrictions. It is a tightrope.

Q. But realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station if you are having problems with a

particular employee, or you wanted to change the format or anything like that, that you are going to end up talking to these partners about those things, if you happen to meet them in a social —

A. I don't know which amendment there is about possible self-incrimination, but I certainly wouldn't answer "yes." I would stick to what this says. I always have control of the second side of communication.

Q. What does it mean then that paragraph on page 10 where it says no limited partner shall act as an employee, agent, contractor of consultant of the partnership?

A. That should be "or consultant."

MR. COHEN: That's a typographical error which has been corrected, your Honor, but not on the record copies and I apologize. That's my error.

JUDGE CHACKIN: You want to know what that means?

MR. COHEN: I think he has answered the question, because it didn't make sense the way I read it.

JUDGE CHACKIN: All right.

BY MR. WOOD:

Q. Do you view this, Dr. Stamps as something of a false distinction that's been imposed on you here by the FCC's requirements to set this thing up in a way that's not in accordance with the way the four of you would normally conduct business?

MR. COHEN: I don't understand the question. I object to the form of the question, your honor.

JUDGE CHACKIN: Sustained.

MR. WOOD: All right. Let me rephrase it.

BY MR. WOOD:

Q. Do you view this restriction set forth here as to the ability of the limited partners to communicate with you on matters pertaining to the day to day operation as an unrealistic constraint that's been imposed upon the partnership by FCC regulations?

A. Well, when I signed the bttom [sic] of this document I signed myself to liave [sic] under this provision. I don't see a restricton here as awkward as it may apparently be any different from SEC's regulations dealing with inside trading or anything else. A lot of these things must be controlled by laws I have to subscribe to. This is what I want. I can live with them.

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No. 91-1744

FILED
JUL 2 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

GALAXY COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's (FCC) award of a qualitative enhancement for minority ownership in a comparative licensing proceeding violates the Due Process Clause of the Fifth Amendment.

2. Whether the FCC erred in affirming the administrative law judge's determination that the limited partners of an applicant for a radio license would be insulated from the conduct of the radio station's business.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 957 F.2d 873. The decisions of the Federal Communications Commission, Pet. App. 16a-28a, the Review Board, Pet. App. 29a-71a, and the administrative law judge, Pet. App. 72a-93a, are reported at 6 F.C.C. Rcd. 721, 5 F.C.C. Rcd. 2432, and 4 F.C.C. Rcd. 5687, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1992. The petition for a writ of certiorari was filed on April 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, an administrative law judge (ALJ) conducted comparative hearings on the mutually exclusive applications of petitioner Galaxy Communications, Inc. (Galaxy) and three other applicants—Anchor Broadcasting Limited Partnership (Anchor), Selbyville Broadcasting Company (SBC), and Susan M. Bechtel—all of whom were seeking a license to operate a new FM radio station in Selbyville, Delaware. Pet. App. 73a. In determining which of the applications would best serve "the public interest, convenience, and necessity," 47 U.S.C. 309(a), the ALJ applied the criteria found in the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) (*1965 Policy Statement*). Those criteria broadly equate the public interest with the "best practicable service" and "maximum diffusion of control" of the mass media. The Federal Communications Commission (FCC) has implemented the goals of the *1965 Policy Statement* in part by giving a "comparative coverage" preference to applicants whose signals will reach a broader area or a larger number of persons, and an "integration" preference to applicants whose owners will be full-time participants in management. See Pet. App. 3a. An applicant with nonparticipating owners may still obtain a full integration credit if the passive owners are insulated from the licensee's business affairs and exercise no control over the licensee. See *ibid.*

In this case, the ALJ awarded Galaxy and Bechtel "very slight" comparative coverage preferences because each of them would cover approximately 20% more total population than the other two applicants. Pet. App. 85a, citing *Resort Broadcasting Co.*, 41

F.C.C.2d 640, 647 (Rev. Bd. 1973).[1] Anchor received a full integration credit because the ALJ found that Anchor's sole general partner, Herman Stamps, would manage the station, while Anchor's limited partners would have no role in or control over the business of the station.[2] The ALJ also awarded Galaxy a full integration credit. Pet. App. 88a-89a. SBC and Bechtel received no such credit. *Id.* at 87a-89a.

The ALJ granted Anchor's application. In so doing, the ALJ focused on Anchor and Galaxy, because each was entitled to full integration credit and had no comparative demerits.[3] He concluded that Anchor's integration credit was qualitatively enhanced by Anchor's minority ownership (based on the minority status of its general partner, Stamps) and Stamps's proposal to move to Selbyville. In addition, Anchor was awarded a credit for its proposal to install auxiliary power. Pet. App. 87a, 89a. The ALJ found that those enhancements and that credit outweighed (1) Galaxy's enhancements for its sole

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[1] Galaxy's application proposed to serve 39,753 persons, Bechtel's 40,465, Anchor's 33,350, and SBC's 33,644. Pet. App. 74a.

[2] The ALJ rejected contentions of competing applicants that Stamps's lifestyle, multiple residences, and advanced age undercut his asserted commitment to manage the station. The ALJ also declined to credit the claim that the limited partnership was a "sham." He noted that the partnership agreement restricted the limited partners to a passive role and that the partners had all testified that they would adhere to the provisions of the agreement. Pet. App. 86a-87a. The ALJ found "no reason to question the sincerity of their pledges." *Id.* at 87a.

[3] SBC received a "diversification" demerit because the spouse of its owner owned a 15% interest in a new radio station in New York. Pet. App. 85a.

owner's recently acquired local residence in Selbyville and the owner's "*de minimis* * * * involvement" in civic activities and (2) Galaxy's credits for auxiliary power and comparative coverage. *Id.* at 89a.

2. A divided Review Board reversed. Pet. App. 29a-71a. The Board concluded that, notwithstanding the terms of Anchor's limited partnership agreement, the record did not support the limited partners' pledge to be insulated from the management of the station. The Board cited the limited partners' active role in an earlier application for a different license, and testimony by one of the limited partners that he was unaware of the present agreement's strict prohibition against his discussing the station's management. The Board also expressed concern that Stamps's testimony was "evasive" with respect to the role of the limited partners in station management. *Id.* at 44a-45a.[4] Accordingly, the Board determined that "Anchor has not carried its burden of rebutting the 'inevasible doubts' that they will operate at arms length; it has conversely compounded them." *Id.* at 45a.[5]

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[4] At the hearing before the ALJ, Stamps answered a question about the "actual relationship" among the partners in part by saying: "I am afraid to answer that question because I know what is expected of me by law." Pet. App. 35a (emphasis omitted). He added, "I mean there's a real world and then there's this. Right here, I am going by this." *Ibid.* (emphasis omitted). When asked whether he "realistically" expected to discuss the station's affairs with his limited partners, Stamps replied: "I don't know which amendment there is about possible self-incrimination, but I certainly wouldn't answer 'yes.'" *Id.* at 35a-36a (emphasis omitted).

[5] The Board also declined to credit Stamps's pledge to relocate to Selbyville to manage the new station. It noted that Stamps had several current homes (none of which was in Selbyville), that Stamps had been "cryptic[]" with respect to his intention to relocate, and that he would not even predict

Finding that Galaxy was therefore the only applicant meriting a full integration credit, the Board held that Galaxy "must prevail" over Anchor, because "a clear quantitative 'integration' advantage cannot be overcome by various qualitative attributes." Pet. App. 53a.

3. The Commission reversed the Board and reinstated the ALJ's decision granting Anchor's application. Pet. App. 16a-28a.[6] The Commission concluded that "the Board took Stamps's testimony out of context and it failed to consider that, although Stamps recognized that the relationship between the partners made it difficult to insulate them from the proposed station's business, he will adhere to the insulation requirements." *Id.* at 18a; see *id.* at 21a. The Commission also found from the testimony before the ALJ that "Anchor's limited partners have demonstrated that they understand their obligations and intend to remain insulated from involvement in the management of its proposed station." *Id.* at 21a.[7]

4. On appeal, the court of appeals affirmed the decision to award the full integration credit to Anchor. The court found "substantial evidence on the

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where his residence would be. Pet. App. 46a. The Board also found Stamps's representations concerning his Virginia tax domicile "flatly inconsistent with his pledge to relocate his prime residence to Selbyville." *Ibid.*

[6] In the proceedings before the Commission, applicant Bechtel argued that the Commission's integration preference should be abandoned; the Commission concluded that "such a change in the comparative criteria would more appropriately be [considered in] a rule making proceeding." Pet. App. 27a n.4.

[7] The Commission also disagreed with the Board concerning Stamps's pledge to reside in Selbyville. Pet. App. 23a-25a.

whole record" to support the FCC's conclusion that Anchor's partnership agreement and the testimony of its partners "established *de jure* legal authority consistent with FCC integration and insulation requirements and a credible commitment to act in accordance with that authority." Pet. App. 8a. The portions of the record upon which petitioner relied were, in the court's view, largely "irrelevant or subject to more than one reasonable interpretation." *Id.* at 9a. The court emphasized, moreover, that the petitioner's contentions related to the credibility of Anchor's partners and that the ALJ was in the best position to evaluate the credibility of their explicit promises to operate the station consistently with the Commission's integration policy. *Ibid.* In those circumstances, the Court found it "especially" appropriate to defer to the Commission's evaluation of the record. *Id.* at 7a-8a, citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496-497 (1951).

Petitioner also claimed, notwithstanding this Court's recent decision in *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997 (1990), that giving Anchor a dispositive preference because of its minority ownership was unconstitutional. The court of appeals, however, concluded that this claim was not properly before it because petitioner had not presented it to the Commission. Pet. App. 7a n.4 (citing 47 U.S.C. 405(a); *Southern Indiana Broadcasting, Ltd.* v. *FCC*, 935 F.2d 1340, 1342 (D.C. Cir. 1991)).

Finally, applicant Bechtel argued on appeal that the Commission's policy of giving an integration preference had been undercut by regulatory changes occurring after the adoption of the integration policy. Specifically, the Commission's 1981 decision to allow full integration credits despite the presence of passive owners made it possible to obtain a full in-

tegration credit even though only a fraction of the ownership was represented in management. And by adopting in 1982 a policy allowing licensees to sell their stations after a year of operation, the Commission effectively shortened the required duration of any integration. These regulatory developments, Bechtel claimed, eviscerated the original rationale for the integration preference. Pet. App. 11a-12a. Noting that "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so," *id.* at 14a, and that the Commission had declined to address Bechtel's arguments, the court remanded the case to the Commission for it to respond to Bechtel's arguments and to reconsider her application in light of those arguments. *Id.* at 13a-15a.

ARGUMENT

1. Petitioner renews its contention that notwithstanding *Metro Broadcasting, Inc.* v. *FCC*, *supra*, the Commission's minority preference policy, as applied here, violates the Due Process Clause of the Fifth Amendment because Anchor effectively received a "*per se* preference" based on the race of its principals. Pet. 10. Petitioner also questions the validity of *Metro Broadcasting*. Pet. 12-15. For several reasons, petitioner's claim does not merit further review.

a. Because petitioner did not raise its constitutional claim before the Commission, the court of appeals properly declined to consider that claim, Pet. App. 7a n.4, and it is not properly before this Court. Under 47 U.S.C. 405(a), "[t]he filing of a petition for reconsideration shall not be a condition precedent to judicial review * * *, except where the party seeking such review * * * relies on questions of fact or law upon which the Commission, or designated au-

thority within the Commission, has been afforded no opportunity to pass." It is undisputed that Section 405 codifies an exhaustion requirement, see *Southern Indiana Broadcasting, Ltd.* v. *FCC*, 935 F.2d 1340, 1342 (D.C. Cir. 1991); *Northwestern Indiana Tel. Co.* v. *FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989), and that petitioner failed to raise its constitutional claim before the Commission. However, petitioner alleges, Pet. 16-17, that presenting its constitutional claim to the Commission would not have served the purposes of exhaustion because a series of appropriations Acts have forbidden the FCC "to repeal, to retroactively apply changes in, or to continue a reexamination of, [its] policies * * * with respect to comparative licensing * * * to expand minority and women ownership of broadcast licenses." Act of Dec. 22, 1987, Pub. L. No. 100-202, § 409, 101 Stat. 1329-31.[8] According to petitioner, presenting its challenge to the FCC would have been futile because the Commission could not have declared the challenged policy or appropriations riders unconstitutional.

While it is of course true that a party need not exhaust remedies when doing so would be futile, see, *e.g.*, *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 587 (1989), that exception to the exhaustion requirement does not excuse petitioner's failure to raise its constitutional claim here. Petitioner principally claims that the FCC's minority preference policy, *as applied to this case*, is unconstitutional because it effectively resulted in a per se minority preference in favor of Anchor. Pet. 8-11. Had petitioner

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[8] See also Act of Oct. 1, 1988, Pub. L. No. 100-459, § 407, 102 Stat. 2216-2217; Act of Nov. 21, 1989, Pub. L. No. 101-162, § 405(d), 103 Stat. 1020-1021; Act of Nov. 5, 1990, Pub. L. No. 101-515, § 404(b), 104 Stat. 2136-2137; Act of Oct. 28, 1991, Pub. L. No. 102-140, § 112, 105 Stat. 797.

raised its claim administratively, the Commission would have been able to respond to the contention that it applied a "*per se* preference" in this case. If the Commission had concluded that a per se preference had been awarded, it would then have been able to address whether the appropriations Acts could be narrowly interpreted to avoid the constitutional question presented if the Acts in fact require such a preference to be applied. Even if the Commission were to have found that the appropriations Acts leave no room to remedy the claims raised by petitioner, the court of appeals would have benefited from the agency's interpretation of its own appropriations Acts as applied to the circumstances of this case. Thus, in the circumstances of this case, exhaustion was still required. See *Thetford Properties IV Ltd. Partnership* v. *U.S. Department of Housing & Urban Development*, 907 F.2d 445, 448 (4th Cir. 1990) ("even though HUD cannot rule on the Act's ultimate constitutionality, exhaustion will nonetheless be an important step if a reviewing court must make that determination"); *Hastings* v. *Judicial Conference of the United States*, 829 F.2d 91, 103 (D.C. Cir. 1987) (constitutional claim should have been exhausted; "the authorities charged with administration of the Act should at least have an opportunity to construe the Act in a manner that comports with the Constitution"); see also *Saulsbury Orchards & Almond Processing, Inc.* v. *Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990).

b. Even if exhaustion had not been required, the issue presented by petitioner was decided by this Court two Terms ago in *Metro Broadcasting*. There, the Commission argued that its use of racial preferences in comparative licensing was the product of a

deliberate choice by Congress,[9] and that Congress made that choice based on sufficient evidence that minorities have been severely underrepresented in the broadcast media. FCC Br. at 18-27, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453 (89-453 FCC Br.). Relying in part on *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 311-319 (1978) (opinion of Powell, J.), the Commission contended that there is a compelling governmental interest in promoting diversity of ideas and expression, and that that interest justifies the use of race-conscious policies in broadcast licensing. 89-453 FCC Br. at 27-32. The use of racial preferences was, in the Commission's view, narrowly tailored to promote diversity, because (a) race was used merely as a plus factor; (b) evidence showed a connection between race and programming content; (c) the FCC had previously tried race-neutral means of promoting diversity; and (d) the policy did not unduly burden nonminorities. *Id.* at 38-49.[10]

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[9] The Commission cited, 89-453 FCC Br. at 19, the appropriations riders that have prohibited the FCC from repealing, retroactively applying changes in, or continuing to reexamine its minority preference policies. See p. 8 & note 8, *supra*. The Commission also noted, 89-453 FCC Br. at 19, that when Congress in 1982 adopted a random selection method of awarding some broadcast licenses, it specifically required that any such scheme include significant preferences for minorities. See Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115(c)(2), 96 Stat. 1094-1095.

[10] In a companion case, *Astroline Communications Co.* v. *Shurberg Broadcasting Inc.*, No. 89-700, the FCC took a similar position with respect to its policy of using race as a factor in distress sales (*i.e.*, the assignment of a broadcast license by a licensee who is in danger of having its license revoked or not renewed).

The United States filed a brief *amicus curiae* supporting the petitioner in *Metro Broadcasting*. The United States argued that the use of a racial classification by the federal government was subject to strict scrutiny. U.S. Br. at 12-17, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453 (89-453 U.S. Br.). Noting that this Court had recognized only the remediation of past discrimination as a compelling basis for using racial classifications, the United States argued there was insufficient record evidence of past discrimination in awarding broadcast licenses to justify race-conscious relief. 89-453 U.S. Br. at 20-22.[11] In addition, the United States contended that the Commission's policy was not narrowly tailored because neither Congress nor the FCC had attempted race-neutral remedies, and the comparative licensing process did not accommodate an inquiry into whether a particular minority applicant had been disadvantaged. *Id.* at 22-23. Finally, the United States attacked the diversity rationale because it requires a "type of racial stereotyping [that] is anathema to fundamental constitutional principles." *Id.* at 25.[12]

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[11] The United States also contended that Congress had not made any authoritative determination that the FCC's racial preference was needed to rectify past discrimination; at most, the appropriations riders relied on by the Commission "direct that the status quo be maintained with respect to the Commission's policies—policies that have always been grounded in the 'programming diversity' rationale, rather than in any finding of prior discrimination." 89-453 U.S. Br. at 19 (emphasis omitted). The United States noted, moreover, that nothing in the 1982 lottery legislation required the use of race in comparative proceedings. *Id.* at 19 n.11.

[12] The United States also filed a brief *amicus curiae* challenging the FCC's minority distress sale policies in *Astroline Communications Co.* v. *Shurberg Broadcasting Inc.*, No. 89-700.

This Court upheld the FCC's use of racial preferences, reasoning that "benign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." 110 S. Ct. at 3008-3009 (footnote omitted). The Court found that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies." *Id.* at 3010. The Court concluded, moreover, that the use of minority preferences in comparative proceedings is substantially related to the goal of promoting broadcast diversity. The Court found that Congress and the FCC had determined that increasing minority ownership would increase programming diversity, *id.* at 3011-3016, and that their judgments were "corroborated by a host of empirical evidence," *id.* at 3017. With respect to tailoring, the Court found that the FCC's racial preferences were adopted "only after long study and painstaking consideration of all available alternatives," *id.* at 3019; that the FCC's policy was "aimed directly at the barriers that minorities face in entering the broadcasting industry," *id.* at 3024; and that it did not place "impermissible burdens" on nonminorities, *id.* at 3025.[13]

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[13] Justice O'Connor, joined by the Chief Justice and Justices Scalia and Kennedy, dissented. See 110 S. Ct. at 3028. The dissent argued that "the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity

Contrary to petitioner's contention, Pet. 10-11, *Metro Broadcasting* fully disposes of its due process claim. Although the minority preference here was outcome determinative, nothing in the reasoning of *Metro Broadcasting* supports petitioner's imaginative position that the Court approved the use of minority preferences only where they made no difference to the outcome of a comparative proceeding.[14] Accordingly,

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determines how they act or think." *Id.* at 3029. Reasoning that strict scrutiny was the applicable standard, *id.* at 3029-3033, the dissent noted that modern equal protection case law has recognized only one interest sufficiently compelling to justify race-conscious government action—"remedying the effects of racial discrimination." *Id.* at 3034. The dissent rejected broadcast diversity as a sufficient justification for race-conscious government action, *id.* at 3036, and found that, in any case, "[t]he chosen means, resting as they do on stereotyping and so indirectly furthering the asserted end, could not plausibly be deemed narrowly tailored." *Id.* at 3037. Justice Kennedy also filed a separate dissent joined by Justice Scalia. *Id.* at 3044-3047.

[14] Indeed, the Court in *Metro Broadcasting* appears to have regarded the minority preference as dispositive. See 110 S. Ct. at 3005-3006 ("The Review Board found that Rainbow's minority credit outweighed Metro's local residence and civic participation advantage."). Petitioner emphasizes, Pet. 8, that the Review Board in *Metro Broadcasting* stated that Rainbow's quantitative advantage was "probably a 'clear' enough difference to be decisional." *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688, 703 (Rev. Bd. 1984). But the Board's statement, when quoted in full, shows that qualitative factors (such as race) might also have been dispositive: "Rainbow is quantitatively ahead of Metro, and while its * * * advantage *is probably* a 'clear' enough difference to be decisional, * * * we conclude that it is ahead qualitatively." *Ibid.* (emphasis added). Because the Court made no effort to determine whether the license could have been awarded to Rainbow

unless this Court were to accept petitioner's invitation to reconsider *Metro Broadcasting*, petitioner's claim must fail on the merits.

c. Even if the issue were properly presented, and the Court were inclined to revisit the question decided in *Metro Broadcasting*, further review would be unwarranted in the interlocutory posture in which this case now stands. A third applicant, Susan M. Bechtel, persuaded the court of appeals that the Commission had insufficiently considered her claim that the use of a quantitative integration credit was no longer justified. Accordingly, the court remanded the case to the FCC "to respond to Ms. Bechtel's challenges and to consider her application in light of those challenges." Pet. App. 15a. If the ultimate resolution of the proceedings on remand leads to the elimination of the FCC's integration policy, which favored both Anchor and petitioner over Bechtel, it is possible that the license will go to a licensee other than Anchor in any case. Hence, minority preferences may ultimately cease to be an issue in this case.

2. Petitioner also argues that the Commission erred in granting Anchor the integration credit, given the testimony that Stamps gave before the ALJ. Pet. 17-21. The Commission, however, properly concluded that, on the record as a whole, there was substantial evidence to support the ALJ's conclusion that Anchor's limited partners will be insulated from Anchor's operation. Pet. App. 17a-26a. As the court of appeals correctly determined, petitioner's challenge to Anchor's integration credit "really goes to the credibility of

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absent the minority preference, it is evident that the Court's analysis did not turn on whether such a preference was dispositive.

Anchor's partners." Pet. App. 9a. Because the court properly deferred to the Commission, whose decision was consistent with the ALJ's credibility determinations, *id.* at 7a-8a, further review of that fact bound claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1744

In The
Supreme Court of the United States
October Term, 1991

GALAXY COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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September 23, 1992

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Pursuant to Rule 15.6 of the Rules of this Court, Petitioner Galaxy Communications, Inc. ("Galaxy") respectfully submits this brief in reply to the United States' and the Federal Communications Commission's Brief in Opposition to Galaxy's Petition for Writ of Certiorari.

THE CONGRESSIONAL BAR TO RE-EXAMINATION OF THE MINORITY PREFERENCE POLICY WAS ABSOLUTE

The FCC denied Galaxy's application for a construction permit for a new FM radio station in Delaware solely because Galaxy's owner was not a member of a favored racial group. The government's Brief in Opposition relies principally on the contention that Galaxy's petition may not be heard by the Court because Galaxy did not, in the government's view, exhaust its remedies before the agency by raising there the constitutional question presented here.

The government cites the exhaustion requirement of Section 405(a) of the Communications Act of 1934, as amended, in support of its position. Section 405(a) provides that a party seeking judicial review of an agency decision may not rely on "questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." 47 U.S.C. § 405(a).

As Galaxy pointed out in its petition, however, it was not Galaxy but Congress which deprived the Commission of the "opportunity to pass" on Galaxy's equal protection claim. Petition at 17. In the appropriations Acts, cited in the government's Opposition at 8 and n.4, Congress forbade the Commission from expending any funds to change or reexamine, *inter alia*, the minority preference policy that relegated Galaxy to second position in the proceeding before the Commission.

There is no indication that Section 405(a) was intended to cover the instant situation, and none of the circuit court opinions cited at page 9 of the Opposition sprang from an absolute bar on the agency's ability to examine an equal protection claim. It would offend the most elemental concept of due process for Congress to insist on presentation of a constitutional argument to an agency

where Congress itself has taken away the opportunity for agency consideration of that argument. Exhaustion of administrative remedies is not required where "the only available administrative procedure ... must be regarded as inappropriate and inadequate and therefore need not be pursued." *Greene v. U.S.*, 376 U.S. 149, 163 (1963).

The United States and the FCC advocate imposition of an exhaustion requirement here because "[h]ad petitioner raised its claim administratively, the Commission would have been able to respond to the contention that it applied a "*per se* preference" in this case. Opposition at 8-9. However, the very exercise the government describes clearly falls within the kinds of activity prohibited by the appropriations Acts. Congress did not exempt any such examination of the constitutional dimensions of the minority preference from its absolute bar on reexamination of the minority preference.

GIVEN CONGRESS' EXPLICIT DIRECTIVE, IT WOULD HAVE BEEN WHOLLY FUTILE FOR GALAXY TO HAVE PRESSED ITS CONSTITUTIONAL CHALLENGE BEFORE THE FCC

The government imagines that the Commission could have "addressed whether the appropriations Acts could be narrowly interpreted to avoid the constitutional question presented," Opposition at 9, but that statement is a *non sequitur*. The Commission could not have addressed Galaxy's constitutional claim while at the same time "avoiding" it. Nor could the Commission have complied with the Congressional mandate embodied in the appropriation Acts by disguising what would, in reality, have been a further examination of the minority preference policy as merely "narrow" statutory interpretation.

In any event, following the language of Section 405(a), the Commission did have the "opportunity to pass" on the key questions of law presented by Galaxy's appeal.

In its appeal before the full Commission, Galaxy argued for greater weight to be placed on its superior technical proposal. The service to be provided to an area which will not receive the signal of the minority-owned station is important to Galaxy's showing of the illogical nature of reliance on the minority preference in the instant case. Of course, for the Commission to have placed greater emphasis on comparative coverage would have had the effect of weakening the minority preference policy by comparison, so it is not surprising that the Commission relegated the discussion of comparative coverage to a footnote in its *Memorandum Opinion and Order*. *See* Petition at Appendix A, page 28a, n.9.

Further, while Galaxy's application was pending before the Commission, Galaxy filed a brief *amicus curiae* with this Court in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), explicitly addressing the constitutionality of the minority preference policy. That brief was served on the Commission, whose opportunity to pass on the constitutional question was limited only by the fact that this Court was considering that question at the time. It is also remarkable that the United States not only must have "considered" Galaxy's position at that time but agreed with it.

The government as much as concedes that Galaxy cannot be required to have exhausted its general constitutional challenge to the minority preference because of the futility of raising such a point at the Commission level. *See* Opposition at 8. However, the government contends that Galaxy should have raised administratively its argument that the minority preference, as applied here, resulted in a *per se* preference. As shown above, the appropriation Acts would have rendered such an effort just as futile as a general objection to the constitutionality of the minority preference.

In sum, as the result of the appropriations Acts there was "no properly authorized administrative procedure" for

Galaxy to exhaust at the Commission. In such a context, exhaustion is not required. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954).[1]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[1] The government's argument that the Court need not take up the constitutionality of a *per se* minority preference at this juncture because the policy may disappear from the FCC's licensing scheme, in light of the Commission's current re-evaluation of its method of awarding licenses, is invalid. The FCC has made clear its intention to apply any new integration formula prospectively. Accordingly, Galaxy's constitutional challenge remains ripe.